

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1699

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74-1706

In The

74-1661

United States Court of Appeals

For The Second Circuit

FABRIZIO & MARTIN INCORPORATED,

Plaintiff-Appellee-Appellant,

vs.

BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT
NO. 2 OF THE TOWNS OF BEDFORD, NEW CASTLE,
NORTH CASTLE AND POUND RIDGE, MARS
ASSOCIATES, INC., and NORMEL CONSTRUCTION
CORP. OF NEW ROCHELLE, a joint venture,

Defendants,

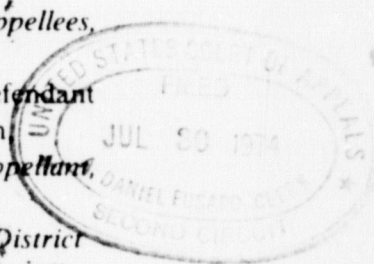
THE BOARD OF EDUCATION CENTRAL SCHOOL
DISTRICT NO. 2 OF THE TOWNS OF BEDFORD, NEW
CASTLE, NORTHCASTLE AND POUND RIDGE,

Defendants-Appellants-Appellees,

AETNA CASUALTY & SURETY CO., Additional Defendant
on the Counterclaim of Defendant Board of Education,

Defendant-Appellee-Appellant,

*On Appeal from a Judgment of the United States District
Court for the Southern District*



APPENDIX

Volume 111, pp. 541 - 810

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PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

Appendix

	Page
Docket Entries 66 Civ. 2935	1a
Docket Entries 68 Civ. 1162	7a
Plaintiff, Fabrizio and Martin, Inc. Com- plaint (Filed September 13, 1966)	10a
Schedule "A" Annexed to Foregoing Complaint	18a
Defendant's Answer (Filed August 11, 1967)	22a
Plaintiff's Reply to Counterclaim (Dated August 26, 1968)	38a
Plaintiff Board of Education's Complaint (Dated March 10, 1969)	45a
Defendant's Answer	56a
Opinion of McLean, J. (Dated May 5, 1967)	70a
Opinion of McLean, J. (Dated May 5, 1967)	73a
Opinion of McLean, J. (Dated July 6, 1967)	80a
Order and Decision of Ryan, J. (Dated October 1, 1968)	96a

Contents

	Page
Opinion of United States Court of Appeals	119a
Pre-Trial Order (Dated October 17, 1972) .	130a
Amendment to Pre-Trial Order Annexed to Foregoing	163a
Exhibit "1" - Proposed Contentions and Issues Annexed to Foregoing Pre-Trial Order	167a
Exhibit "2" - Proposed Additions Annexed to Foregoing Pre-Trial Order .	172a
Transcript of Proceedings Before Carter, J. March 1, 1973	176a
Transcript of Proceedings March 2, 1973 . .	313a
Transcript of Proceedings March 5, 1973 . .	475a
Transcript of Proceedings March 6, 1973 . .	664a
Transcript of Proceedings March 7, 1973 . .	869a
Exhibit D - 7 - Standard Form of Agreement	1025a
Exhibit D-31 - Supplemental Agreement Dated March 23, 1965	1036a

Contents

	Page
Exhibit D-98 - Analysis of Completion . .	1051a
Findings and Opinion of District Court Dated March 27, 1974	1054a
Judgment (Filed March 28, 1974)	1074a
Extract of the Minutes Annexed to Foregoing Judgment	1075a

Witnesses

Robert F. Crane:

Direct	177a
Cross	259a
Redirect	292a, 747a
Recross	793a

Charles W. Fowler:

Direct	297a
Cross	410a, 601a
Redirect	656a
Recross	705a

Anthony C. Sabella:

Direct	581a
Cross	594a

Clifford Q. Christensen:

Direct	822a
Cross	825a

Contents

	Page
Thomas P. Moyna:	
Direct	826a
Richard B. Pratt:	
Direct	829a
Cross	839a
Redirect	843a
Recross	844a
Harold Wareham:	
Direct	845a
Cross	850a
Redirect	852a
John Wiley:	
Direct	853a
Michael J. Buckmir:	
Direct	855a, 892a
Resumed	888a
Cross	914a, 947a
Redirect	949a
Max E. Greenberg:	
Direct	870a
Cross	875a
Oliver Kirchoff:	
Direct	922a
Vincent Fabrizio:	
Direct	968a

Contents

	Page
Cross	999a
Redirect	1005a
Joseph Brandes:	
Direct	1011a

gte 4

Fowler - cross

355

respect to that bond issue?

A May I just explain what happened and then you can direct your questions to my explanation?

Q Surely.

A The vote in 1963 was a vote yes or not to approve the construction of a school, a Middle School for \$4,050,000. That's what the people in the community voted on.

Members of the Board of Education indicated that while that is what the people were being asked to vote on, their intention was that they would only issue 3.8 million dollars worth of bonds.

Q All right. As long as you are explaining the whole thing, why did the Board only agree to issue bonds for the sum of three million eight as opposed to the four million fifty?

A There were some members of the Board who were concerned about the cost of the project and it was the Board's desire, as I recall, to present a unified approach to the community so that it would better insure passage of the referendum by the community.

So the Board Members met and attempted to resolve their differences and agreed that they would tell the community that they intended only to issue three point eight million dollars worth of the four million fifty thousand dollars worth

1 gte 5 Fowler - cross
2 of bonds that were to be authorized.

3 Q Go ahead.

4 A The process here is one of the community giving the
5 authority to issue the bonds up to a certain amount, but
6 the Board retains the authority to determine the specific
7 amount of bonds being issued.

8 After the passage of the bond issue, the Board then
9 did, indeed, authorize in a Bond Resolution that three point
10 eight million dollars in bonds be sold.

11 At a later time, in 1966, after the default of
12 Fabrizio and Martin and after the completion contracts had
13 been let, they then adopted another resolution, it did not
14 require voter approval, it simply was a resolution authorizing
15 the issuance of the additional \$250,000 in bonds which had
16 been already approved by the community, but which they, as a
17 Board, had not authorized to be issued.

18 Q But isn't it a fact prior to the resolution approving
19 the issuance of the additional \$250,000 bond issue that that
20 \$250,000 was not included within any budgetary figures that the
21 School Board prepared?

22 A I am not following your question.

23 Q You referred previously here in referring to
24 Plaintiff's Exhibit 16 that the bond issue of \$214,000 for
25 furniture and equipment refers to the full bond issue of

gte 6

Fowler - cross

357

\$4,050,000 and not to the three million eight hundred thousand dollars.

Are you telling me that the School Board was referring to the \$4,050,000 bond issue before they passed a resolution agreeing to increase the bond issue from \$3,800,000 to \$4,050,000?

A No, just the opposite.

This exhibit is dated April 1967. They adopted the resolution authorizing the additional \$250,000 in 1966.

Q For the bond issue or warrants?

A It is the same thing. They first have to authorize the sale of bonds before you can issue warrants on them, notes on them.

THE COURT: Was there an additional \$250,000 bond issue later or is this all included?

I thought there was an additional \$250,000 bond issue in 1971?

THE WITNESS: The community authorized the Board in 1963 to spend up to \$4,050,000.

THE COURT: I understand that. And the Board said we will keep it to three point eight, but then they decided in 1966 that they would go to four million fifty?

THE WITNESS: Yes.

THE COURT: Is there then an additional \$250,000

1 gte 7

Fowler - cross

2 over and above that, or are we talking about the \$250,000 from
3 3.8 to 4,050,000?

4 THE WITNESS: From 3.8 to 4,050,000, that's what we
5 are talking about.

6 THE COURT: So the authorization which occurred in
7 1966, that is the same \$250,000 bonds that you are talking
8 about in 1971?

9 THE WITNESS: Yes, that's correct. What they did
10 was rather than sell the bonds right away because we weren't
11 certain whether we might recoup some of our costs, we issued
12 notes, but then five years later it became obvious that it was
13 going to be necessary to actually sell the bonds, so the
14 bonds were actually sold in 1971 with five years of notes
15 renewed each year before that.

16 THE COURT: The question I think that Mr. Powers
17 has been getting at and I am trying to get a handle on in
18 my own mind is, were some of the construction costs that
19 necessitated the issuance of the additional \$250,000 in bonds,
20 weren't those construction cost items--had they not occurred
21 before whatever time it was that Fabrizio ceased working on the
22 contract?

23 Hadn't you committed those construction costs?

24 I think that is the item that we have been dealing
25 with for about the last 45 minutes.

gte 8

Fowler - cross

359

1
2 THE WITNESS: The answer to that, your Honor, is
3 that there were--we did run over in certain of the budget
4 categories prior to the time Fabrizio and Martin left the
5 job.

6 My response to Mr. Powers, however, is, had Fabrizio
7 and Martin not left the job, there would have been sufficient
8 funds within the three million, eight to complete at least
9 our construction costs.

10 We would not have had to issue the \$250,000 in bonds
11 because we could have used furniture and equipment money for
12 construction costs.

13 MR. POWERS: You see, this is my point, your Honor.
14 I think this is a case of book juggling, really, where you get
15 the money from and what the money is actually needed for, and it
16 appears--

17 THE COURT: I think as I understand what Dr. Fowler
18 has said, at least the contention is the construction costs
19 could have been met with the three point eight million in bonds
20 and they could have bought equipment and so forth from some
21 other source, thereafter, that is the reason, I gather, that
22 they are justifying charging Fabrizio for the interest on the
23 bonds because of the fact that their theory is they would not
24 have necessitated their getting the extra bonds or going through
25 that extra indebtedness because even though they had overruns

1 gte 9

Fowler - cross

2 they could have made it within the three point eight million
3 dollars.

4 THE WITNESS: That's right, your Honor.

5 THE COURT: That is the contention, anyway.

6 THE WITNESS: That is the contention. And we couldn't
7 have used operating funds for construction costs, but we could
8 use operating funds for furniture and equipment.

9 Q But then if I may, Dr. Fowler, by following through
10 if I may for one minute, by doing that, what you have just
11 stated, you could not live up to your original budget, which
12 provided for approximately \$280,000 of the three point eight
13 million to be used for furniture and equipment.

14 A Our budget, that's correct.

15 Q You would use that 283,000 for construction and then
16 go to another drawer and get the money for the furniture and
17 equipment without having to issue bonds, is that correct?

18 A Not necessarily the whole \$280,000, but a portion of
19 it, right.

20 Q Doctor, I show you this analysis of cost, dated as
21 of May 26, 1966, and ask you if you can identify that?

22 A Yes.

23 Q Did you prepare that or was it prepared under your
24 direction?

25 A I believe it was prepared under my direction.

1 gte 10

Fowler - cross

2 Q Do you know if you have a clearer copy of this
3 that is handy?

4 A It may be handy, but handy where I am not sure.

5 MR. POWERS: We will mark this at least temporarily,
6 then.

7 I would like to offer it as the next exhibit.

xx

8 (Plaintiff's Exhibit number 18 was received in evi-
9 dence.)

10 Q Could you describe for the Court what this analysis
11 is, please?

12 A It is entitled, "Analysis of Direct Cost to School
13 District Following Default of Fabrizio and Martin as of May
14 26, 1966."

15 It lists a number of columns to categorize the nature
16 of the expenditure and then it lists horizontally the names of
17 the contractors or subcontractors or vendors who billed us
18 for these costs.

19 Q There is a column there entitled "extras," is there
20 not?

21 A Yes.

end 5b

22

23

24

25

1 Qg 1

Fowler-cross

2 Q And could you tell me, please, what that column
3 represents?

4 A This appears to refer to change order items, some
5 of which we have discussed; you have asked me about this
6 morning on the change order to Mars-Normal.

7 Q That change order that we referred to earlier
8 was not issued until December of 1966.

9 Do you know whether the items here listed under
10 extras were items above and beyond the work required to
11 be performed by Fabrizio & Martin under its contract with
12 the School Board?

13 A No.

14 Q You don't know?

15 A No. The same answer that I had earlier.

16 Q Also looking at this analysis, Plaintiff's Exhibit
17 18, could you tell me, please, how many contracts with
18 MacNamee are referred to?

19 A Two.

20 Q Only two, not three, correct?

21 A That is correct.

22 Q And one is for the curbing and so forth?

23 A One says grading and the other says roads in an
24 abbreviated form, yes.

25 Q The grading for \$25,500 which you previously

1 Qg 2

Fowler-cross

363

2 testified to as being a maximum and then the other for roads
3 in the sum of \$62,500 which is the lump sum.

4 A Yes.

5 Q There is no reference to any third contract there,
6 is there?

7 A No.

8 Q With MacNamee, that is?

9 A No, there is not.

10 Q And in connection with the Bradhurst contract there
11 is a reference to change in baseball diamond as being an
12 extra for an estimated \$800.

13 Do you know whether there is any reference to that
14 extra in the change order issued to Bradhurst?

15 A No, I don't.

16 Q I show you this current analysis of the Middle
17 School fund of November 28, 1966 and ask you if you can
18 identify that for us.

19 A Yes.

20 MR. POWERS: I ask that this be marked as the
21 next exhibit.

22 (Plaintiff's Exhibit 19 received in evidence.)

23 Q As it states, Doctor, I take it this is a current
24 analysis of the payments made in connection with the building
25 of the Middle School together with an estimate of the

1 eg 3

2 Fowler-cross

3 remaining payments to be made and then the total cost of
4 the project.

5 There is a final line which says "Needed to fin-
6 ish project, \$64,483," and that \$64,000 is over and above,
7 I take it, the original bond issue of \$3,800,000 and the
8 bond anticipation notes of \$250,000 plus the Middle School
9 plans and specifications for which there was a bond issue,
10 was there not, for \$165,000?

11 A yes.

12 Q And it was estimated at this juncture that the
13 cost to complete the school would be \$64,000 over those
14 amounts roughly?

15 A yes.

16 Q Isn't it a fact that the expenses in connection
17 with the Middle School plans and specifications exceeded
18 the \$165,000?

19 A I don't recall. I believe that occurred before I
20 had any responsibility at the Board office.

21 Q Let me refer you to Plaintiff's Exhibit 17,
22 Doctor, which is an accountant's report for the month of
23 December, and I refer you specifically to items 1, 2 and 3
24 listed under the Middle School Project.

25 Did they not indicate that there was an approximate
deficit of \$15,000 for Middle School plans and specifications?

1 Qg 4

Fowler-cross

2 A Yes, they do.

3 Q So, in other words, the cost of preparing the
4 plans and the plans and specifications which include
5 your architect's fee and your engineering fee and general
6 administration in connection with this was \$15,000 more
7 than they originally budgeted and provided for?
8

9 A It would appear so.

10 Q And here again this is \$15,000 higher in December
11 of 1965 which was prior to any termination of Fabrizio
12 or any completion cost in connection with the completion
13 of the school?
14

15 A Yes.
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take 6b

1 jge 1

Fowler - cross

2 Q As far as the amount needed to finish the project
3 of that \$64,000, \$15,000 of that is in connection with the
4 plans and specifications, isn't that so?

5 A I don't know that you can necessarily say that the
6 15,000 is a part of the 64.

7 The 64 is an aggregate figure.

8 Q Wouldn't it of necessity be part of the figure? That
9 is, to show your total cost?

10 A The total cost considering all three projects and the
11 total income, there is a negative balance of 64,000.

12 Whether that 64,000 includes that particular 15,000,
13 I don't think anybody can testify to that.

14 Q You don't know whether that 15,000 is over and above
15 the 64?

16 A The expenses and the income that went together to
17 make that \$15,000 deficit are reflected in the expenses and the
18 income in this sheet which lead to the \$64,000 figure.

19 Q So that 15 is included within the 64 then, that
20 15,000 would be somewhere in there?

21 A If you wish to interpret it that way.

22 Q Doctor, there was some testimony earlier, I believe
23 it was with Mr. Crane, that the original contract with
24 Fabrizio and Martin provided for a completion date of, I
25 believe, September 15, 1965. Do you know whether Fabrizio

1 jpe 2

Fowler - cross

2 and Martin ever advised the School Board that that completion
3 date was an unrealistic date?

4 A I recall his advising the School Board that he could
5 not meet that date. I believe I also recall our adopting a
6 change order that extended that date by a few days.

7 Q You mean he said he could not meet the date so you
8 gave him a change order which provided for four days suspension?
9 Is that what he said, "I can't meet it for four days?"

10 A I can't recall the specifics. I recall Mr. Fabrizio
11 saying he could not complete by the September 15th deadline.
12 I recall one change order that in addition to ordering the change
13 in the work he suggested that that date be extended.

14 Q You were in attendance at the closing, the signing
15 of the contract?

16 A No.

17 Q Do you know whether at the time of the signing of the
18 contract or any time shortly thereafter or before Fabrizio and
19 Martin advised the School Board that the dates contained in the
20 contract were unrealistic or the date contained in the contract
21 was unrealistic for completing the school?

22 A I know nothing about such an indication by them before
23 or at the time of the contract signing. I am sure there is
24 correspondence here somewhere that would contain that kind of
25 statement in the letter from Mr. Fabrizio after he was on the

1 jge 3

Fowler - cross

368

2 job.

3 Q I show you a letter of July 10, 1964 from Fabrizio and
4 Martin to the Architects Collaborative and ask if you have
5 seen a copy of that letter?

6 A I am sure it is probably a part of the Board records.

7 Q A copy was sent to Dr. Lynch.

8 A Yes.

9 MR. POWERS: I would like this marked as the next
10 exhibit in evidence, please.

11 (Plaintiff's Exhibit 20 received in evidence.)

12 Q I will read from this, Doctor and verify whether this
13 is what it says in the second paragraph, second sentence,
14 "We are conforming to the dates of the contract as per your
15 instructions. However, we do not believe that this is a realis-
16 tic schedule b c we will do everything within reason to meet
17 it."

18 This is what the reference to the completion date
19 there is, is it not?

20 A To the progress schedules.

21 Q And the progress schedules have to tie in?

22 A Ultimately they must end in a completion date.

23 Q And the date of the letter is July 10, '64 which is
24 shortly after he commenced work.

25 He commenced work in April of '64.

1 jge 4

Fowler - cross

2 A The contract was in March.

3 Q The contracts were signed in March. Some work started
4 late March, early April, right?

5 A Yes.

6 THE COURT: Is this a good time, Mr. Powers, for us
7 to break for lunch?

8 MR. POWERS: I think so, your Honor.

9 THE COURT: We are adjourned until 2 o'clock.

10 (Luncheon recess.)

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1 gte 1

2 AFTERNOON SESSION

3 2:00 p.m.

4 C H A R L E S W. F O W L E R, resumed.

5 CONTINUED CROSS EXAMINATION

6 BY MR. POWERS:

7 Q Dr. Fowler, I show you a copy of a letter dated
8 September 22, 1964 from Fabrizio and Martin to the Aetna
9 Casualty and Surety Company, with a copy to Mr. Carter, the
10 attorney for the School Board at the time that letter was
11 written, and ask you if you have seen that previously?

12 A I don't recall seeing the document, but it is
13 entirely possible that Mr. Carter forwarded a copy of it to Dr.
14 Lynch.

15 Q Would you know whether he had and whether it is part of
16 the School Board's records?

17 A From the face of this copy, I cannot tell.

18 Q Could you check that out, please?

19 A It would be probably in the first volume of the
20 Fabrizio correspondence.

21 Q I think that one volume covers the period involved.

22 A Yes, it does.

23 Yes, there is a copy in the Board's records.

24 Q Is there anything in that letter with respect to the
25 progress schedule for the project?

1 gte 2

Fowler - cross

2 A Yes.

3 Q And did Mr. Fabrizio in that letter comment on the
4 progress or the proposed completion date?

5 A Yes, he does.

6 Q Doesn't he state I believe it was at the signing of the
7 contract, he indicated it was an unrealistic date to everyone
8 that was present at the contract signing?

9 A He says, "I instructed everyone present that the
10 contract date could not be met because we had no control of
11 the project as we are not the general contractor on this pro-
12 ject.

13 Q What follows that?

14 A "Being prime contractor for General Construction and
15 site work only and no authority over the other prime con-
16 tractors."

17 Q Would you read on just the next sentence?

18 A "However, the architect advised that the building
19 committee, Board of Education, wanted this date in the contract
20 and since there is no penalty in the contract for non-com-
21 pliance of the completion date, what difference would it make,
22 and this date was a date to aspire to, also."

23 MR. POWERS: Thank you. I ask that this be
24 marked as the next exhibit, please.

25 (Plaintiff's Exhibit 21 was received in evidence.)

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gte 3

Fowler - cross

372

Q Doctor, in the original letting of the contract, I believe the testimony is that the Rand Construction Company was the first low bidder or the lowest bidder?

A That's correct.

Q About a month or so after the bid opening, Rand contended that it had made a mistake in its bid?

A I am not sure of the "I am" element, yes, it was after.

Q And the second low bidder was Fabrizio and Martin?

A Yes.

Q I believe two days after the bid opening, Fabrizio and Martin had advised the School Board that it had made a mistake in its bid.

A Again, I am not sure as to the two dates, but it was right after the bid opening.

Q Actually, before Rand had notified the School Board?

A Oh, yes.

1b pm

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Fowler-cross

2

Q And then there was a third low bidder, was there not, the Walter A. Stanley Company?

3

4

A Was the next highest bidder, yes.

5

6

Q Do you recall what the amount of the Walter A. Stanley bid was for this project?

7

A No, I don't.

8

9

Q Do you have any records that would refresh your recollection?

10

11

A I am sure there are some over there, an original bid sheet, analysis sheet. It is not something we used before. I will have to get up and look for it.

12

13

Q I have a memo of yours which refers to the price.

14

15

If I may, I have a memorandum of yours, Doctor, to Duane Ahlf, dated January 3, 1966, and ask you if you can identify that memorandum.

16

17

18

A Yes.

19

20

Q On page 2 of that memorandum, do you advise Mr. Ahlf or Dr. Ahlf of the bid of the third highest bidder?

21

22

A Yes.

23

Q Or third lowest bidder, I should say.

24

What was the amount of that bid?

25

A \$2,549,000 base bid.

Q And then there was an alternate three in addition

1 geg 2

Powler-cross

2 to that?

3 A Alternate three bid on the track of \$135,000.

4 Q So that is \$2,684,000 for the combination, ap-
5 proximately, is that correct?

6 A It appears to be, yes.

7 Q As opposed to Fabrizio's bid of what?

8 A Base bid of \$2,326,000 plus 99 for the track.

9 Q \$2,425,000.

10 And there is a difference of roughly approxi-
11 mately \$250,000 between Fabrizio's bid and the Stanley
12 bid, is that correct?

13 A I have forgotten the figures.

14 Q The Stanley being about \$250,000 higher?

15 A Yes.

16 Q And the Walter A. Stanley Company was the lowest
17 bidder who did not contend that he had made a mistake in
18 his bid, isn't that so?

19 A Yes.

20 Q And were there any other bids received other than
21 those three?

22 A I believe there were three others.

23 Q And those three others were all higher than the
24 Stanley bid?

25 A That is correct, on the base contract.

gg 3

Fowler-cross

375

1 Q Do you recall up to what figure the highest bidder
2 was?
3

4 A No, I don't.

5 Q Do you know whether it was substantially higher
6 than the \$2,684,000 of the Stanley bid?

7 MR. YAVNER: Your Honor, I am going to object to
8 this question and ask that the preceding ones on this
9 subject also be stricken.

10 They do not relate to the issues as you defined
11 them the other day and the consequential damages and the
12 underlying equities of this case.

13 I don't know what difference it makes that there
14 were six bids and there were several of them higher than
15 Fabrizio.

16 MR. POWERS: To the contrary, your Honor, I think
17 it is most material in that it is evidence of the true
18 value of the construction of this school.

19 MR. YAVNER: The fact that there were bids
20 that are higher, there are always bids in ranges, and that
21 does not demonstrate the value of the job at all.

22 MR. POWERS: The Stanley bid was the lowest
23 bidder that had not claimed any mistake in its bid and it
24 is my contention, your Honor, that this is an indication
25 of the true value of the school, the cost of building the

1 gtg 4

 Fowler-cross

376

2 school.

3 MR. YAVNER: It is a very---

4 THE COURT: I am not persuaded by that, but I
5 think you should be given the opportunity to persuade me.

6 MR. POWERS: I am not necessarily saying that that
7 is the value, your Honor, all I am saying is that it is an
8 indication, one of the indications of the true value --

9 THE COURT: Proceed.

10 Objection overruled.

2a pm

563a

Came

Og 1

Fowler-cross

377

Q Dr. Fowler, I believe we touched on this earlier in the trial but do you recall there being some question concerning the accuracy of the borings that were taken and on which the contract drawings were prepared?

A I do remember discussion of that, yes.

Q Could you describe for the Court, please, what you mean or what you understand the word or the term "borings" to mean?

A My understanding is that these are borings into the ground to determine the level at which rock might be encountered.

Q Either rock or various types of soil?

A Subsoil condition that would make it difficult for construction.

Q Do you recall at the time that borings were taken what the condition of the surface was?

A No.

Q What do you understand as having been some difficulty in connection with the soil borings?

A My understanding is that at the time of the first change order I believed it showed Fabrizio & Martin for additional rock allowance. Mention was made when that rather substantial change order was processed by the Board that a reason for the change order was difficulty

Qg 2

Fowler-cross

378

with the test borings.

Q Do you recall a letter from a Mr. Schappa who was the architect's representative, in effect, was he not? He worked for the architect?

A Yes.

Q During the early part of the construction?

A Yes.

Q A letter from the architect to Dr. Lynch dated June 2, 1965. If I ask you if you are familiar with that letter, what is your answer?

A I am familiar with it as a document that was in our records.

Q Isn't it a fact that in that letter the architect states that the borings were taken while there was snow on the ground?

A He says "from my records it appears that the site surveyed was accomplished during the winter of 1963 when there was snow on the ground."

Q Doesn't he also indicate that there were certain areas where the borings were of either two or three inches? I say say feet, excuse me, two or three feet?

A He says "As work has progressed on the site certain errors in the site survey have been noted, in particular on the east line west of the new entrance road to

1 Q3
2 gtg

Fowler-cross

379

3 the site which resulted in an extension to the 30-inch
4 drain line covered by change order No. 4. At the east
5 wall of building A the grade was two feet lower than shown
6 on the site survey."

7 MR. POWERS: I ask this be marked.

8 (Plaintiff's Exhibit 22 received in evidence.)

9 Q Isn't it also a fact, Doctor, that at some time
10 during the progression of work the survey was changed, the
11 original survey, from the job was replaced by someone
12 else?

13 A I don't recall that.

14 Q Do you recall who the original surveyor was?

15 A I believe the letter indicates Henrici & Asso-
16 ciates.

17 Q Do you remember some time later in the project
18 a Mr. Sullivan acting as the surveyor?

19 A I don't recall.

20 Q I show you a copy of a letter of July 15, 1964
21 from Fabrizio & Martin to the Board of Education and
22 ask you if you can identify that document, please.

23 A Yes.

24 MR. POWERS: I ask this be marked as the next
25 exhibit, please.

(Plaintiff's Exhibit 23 received in evidence.)

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Fowler-cross

380

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3 Q Isn't this a letter, Dr. Fowler, in which the
4 firm of Fabrizio & Martin indicates to the School Board
5 the difficulties that it is encountering in connection with
6 the project in the various areas in which it is being
7 hampered and delayed?

8 A The letter indicates that the firm finds it im-
9 possible to continue the work and then cites a number of
10 items substantiating their position.

11 Q And doesn't the letter indicate and quote
12 the provision of the specifications with respect to change
13 orders?

14 A Yes, one of the reasons which it gives for its
15 action is --

16 Q In paraphrasing in effect, don't the specifica-
17 tions provide that change orders shall be issued before
18 the work is commenced in connection with those change
19 orders?

20 A The work should not be commenced unless a change
21 order has been issued.

22 Q Do you recall testifying earlier today that it
23 was common practice to have the work performed before
24 the change order was issued not only by Fabrizio & Martin
25 but also by Mars-Normel?

A That is the history of the job, yes. That is what

Qg 5

Fowler-cross

381

happened.

Q In other words, the School Board was ignoring the povision of the contract which required change orders to be issued before the work was commenced?

A I would say the contractor was ignoring the provision of the contract.

Q The contractor was?

A By doing the work before the Board authorized it.

Q How long did it take the Board to issue change orders, Doctor? Did you ever tally up or check the change order file to determine when a change order was requested and when the change order was actually issued and the work paid for?

Have you ever performed such an analysis?

A No, I have not.

MR. YAVNER: Were you planning to introduce that last letter as an exhibit?

MR. POWERS: It is in evidence.

MR. YAVNER: May I see it again?

MR. POWERS: Certainly.

MR. YAVNER: As to this last group of letters, in view of your previous rulings when I objected earlier, I hesitate to stand but all of these relate to the conflict between the Board and Fabrizio prior to February

Qg 6

Fowler-cross

382

of 1965 at which time Fabrizio walked off of the job and all these early differences were resolved in the supplemental agreement.

I must object to this on the ground of--

THE COURT: It seems to me that it may be excessive but I think what it helps to do is bring out the facts. There has been a great deal of material put in here that I am sure has very little relevance but that involved a dispute and it may or may not have been resolved.

There are underlying factors.

MR. YAVNER: We have all of our correspondence which shows the letters sent to him. There was a dispute and it was resolved in the supplemental agreement.

The very "whereas" clauses, the recitals of the supplemental agreement --

THE COURT: What is the purpose of these?

MR. POWERS: There have been very broad, general, nebulous claims made on direct proof of the defendant.

THE COURT: Just tell me what you mean.

MR. POWERS: That Fabrizio & Martin delayed in the progress of the work. There is also a contention made that Fabrizio should have finished the work on October 15, 1965, which is the date contained in the contract.

gtg 7

Fowler-cross

383

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3 I am showing not only through the evidence that
4 I have introduced but in additional evidence that the
5 reason why, number one, that date was never agreed to;
6 number two, that there were numerous delays on this job
7 that were the fault of the School Board and not the fault
8 of Fabrizio & Martin and he should not be penalized for
9 any delays that the School Board is contending.

10 THE COURT: The School Board has not asked the
11 damages because the building was delayed beyond the date
12 of the contract. There has been no request for that.

13 I do recall that Mr. Yavner did introduce some
14 evidence that you could have completed it at that time.
15 But there is no serious claim--

16 MR. POWERS: There are claims about the archi-
17 tect's fees.

18 THE COURT: One at a time.

19 MR. POWERS: The architect's fees where he is
20 claiming damages against us from September 15 and charging
21 all of the architect fees after that date to Fabrizio &
22 Martin and these other elements of damages.

23 THE COURT: I think it will save us more time if
24 I let you put it in.

25 Go ahead.

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Fowler - cross

384

2 MR. POWERS: I just as soon not put it in really
3 because it is delaying really.

4 THE COURT: Not the way you are going.

5 MR. POWERS: These general allegations were made and
6 I feel they have to be answered with specifics.

7 THE COURT: You have won your point so go on.

8 Q Dr. Fowler, I show you a copy of a letter dated
9 October 27, 1964 from the architect to Dr. Lynch and ask you if
10 you can identify this, please?

11 A Yes.

12 Q Doctor, could you tell me please what happened to
13 that letter? I should say what happened to the original of
14 that letter.

15 A My record don't indicate what happened to it.

16 Q Do you have any recollection?

17 A As I previously stated, my recollection is that the
18 Board of Education discussed this whole problem of rock and
19 potential change orders for blasting of rock.

20 Q Were you ever told by anyone to do anything with
21 the original of that letter?

22 A I was not. Dr. Lynch may have submitted it. I
23 imagine he would have submitted it to the Board.

24 MR. POWERS: I would like this marked as the next
25 exhibit.

jge 2

Fowler - cross

385

MR. YAVNER: I repeat the same objection to this as the others.

MR. POWERS: Your Honor, based on what you stated a few minutes ago, I am perfectly agreeable to move things along to eliminate any further cross examination of Dr. Fowler with respect to this issue of delays.

However, there are items of damages contained in the supplemental and amended answers to interrogatories with respect to that and if Mr. Yavner--

THE COURT: You are not asking for any damages, Mr. Yavner, are you for delays that occurred prior to the cancellation or the walking off of the job of the plaintiff in this case?

MR. YAVNER: We had asked for liquidated damages under the supplemental agreement and you have ruled that we are not permitted to ask for that because that derives from the very invalid agreement itself.

That is your ruling. The damages that we are asking for for the architect, as I recall, are because of the increased cost and his percentage goes up automatically on the total amount of the construction contract and has nothing to do with a delay.

THE COURT: It does not seem to me that up to this point--

jge 3

Fowler - cross

386

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2 MR. YAVNER: Specifically as the state of the evidence
3 is right now we are not. We are asking, apart from the first
4 counterclaim, for the completion costs, for the additional dis-
5 bursements that we had to make in connection with that, we are
6 asking for the interest costs. You have ruled that we may not
7 ask for anything about the three prime contractors, that we may
8 not ask for anything about the two subcontractors who made claim
9 against us and you ruled we may not have anything about the
10 liquidated damages.

11 THE COURT: I thought that you were asking for anything
12 that added costs that you were required to undertake for the
13 completion of the building after these people walked off and
14 then you are asking for all of the money that you paid out for
15 that.

16 Is that what you are asking?

17 MR. YAVNER: Yes.

18 THE COURT: It seems to me that that is the most that
19 you are entitled to and, in any event, I think under those
20 circumstances all we can do is eliminate this aspect of delays
21 that were caused that resulted from both parties who thought
22 they had a valid contract and were attempting to operate under
23 it.

24 It seems to me that is not an appropriate measure of
25 damages in this kind of case.

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Powler - cross

387

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3 MR. POWERS: If I understand your Honor, there is an
4 item for \$23,000 for increased cost for the clerk of the works.
5 There is a 19,000 plus dollar claim for increase in archtec-
6 tural fees. There is another claim of \$23,000.

7
8 THE COURT: But those costs are not costs that were
9 due to your delays. Those were costs, as I understand them,
10 that they are alleging that they were required to take on the
11 Clerk of the Works on to complete the contract because when
12 you walked off, these are supposed to be costs that the
13 School Board was required to take. Not because of delay
14 on your part but costs after Fabrizio walked off.

15
16 Now, if any of these costs are not so defined then
17 I think that we will have to define what they are and get part
18 of them eliminated.

19
20 MR. YAVNER: You have stated it exactly. The areas
21 in which we were alleging that delays was a factor were
22 primarily the suits brought against us by the three prime con-
23 tractors and by the two subcontractors.

24
25 With those out of the case under your ruling and with
the liquidated damages out, we are not requesting damage for
delay at all.

MR. POWERS: With respect to these items that I
mentioned, the architects' fee, the Clerk of the Works fee and
so forth, the increased cost, I truly have difficulty in under-

pge 5

Fowler - cross

388

standing how the Court can allocate these costs as part of the completion costs or as to whether they should or should not be part of the completion costs because these are only costs that are allocable to Fabrizio and Martin if Fabrizio and Martin improperly walked off the job and not if Fabrizio and Martin properly walked off the job.

That gets into the question of the contract.

THE COURT: It does not at all.

MR. POWERS: This is where I am having difficulty in understanding this. I don't see that at all.

THE COURT: It doesn't at all. The action for Fabrizio walking off the job is not an action on the contract, it is an action on the theory that the School Board because they didn't complete the job therefore had these added costs.

The School Board is asking to get the money back they paid to you plus whatever it cost them to get the building built and whether your walking off the job was a valid move or not, they are making this allegation because you left them with the cost of completing buildings.

So they say under the circumstances to finish building the school it cost us so much money in additional funds for your going off the job plus the fact that we want the money back.

MR. POWERS: Under those circumstances, I am trying

jpe 6

Fowler - cross

389

1 to understand so I know which way I can approach this if at
2 all, under those circumstances, isn't Fabrizio and Martin being
3 penalized, if you just take whatever the completion cost of
4 the School Board was in connection with the completion if it
5 wasn't our initial responsibility?
6

7 THE COURT: Come on, Mr. Powers, the point is that
8 this is what the School Board is now seeking under the circum-
9 stances. You are alleging that there are equities in the
10 situation which would prevent them from getting nearly that amount.
11

12 I don't see why you are confused about the contract.

13 MR. POWERS: I think I understand now, your Honor.

14 MR. TRAGER: Could I address you on one thing, your
Honor.

15 THE COURT: You may. You have been trying for a
16 little while. Go ahead.

17 MR. TRAGER: If you recall, there was some discussion
18 with respect to testimony, I think by Mr. Crane on those damages
19 that were represented by payments to the architect and to
20 arrive at the amounts, whatever it was, they calculated--the
21 testimony I think indicated--that it was taken from September
22 of '65, to I believe, November or October of '66 to come up
23 with the amount and the result--or they arrive at it by taking
24 the original completion date to the date it was actually com-
25 pleted therein contending that the period from the original

jge 7

Fowler - cross

390

1 completion date on the Fabrizio and Martin contract they were
2 entitled to all of those costs. That would be a delay in per-
3 formance of the original contract.
4

5 THE COURT: I know that is what they are alleging
6 but what you have to do, it seems to me, you can put a needle
7 in that and burst that somewhat by showing that some of these
8 costs that they are alleging, at least from the date of the
9 contract and so forth, that some of these costs occurred
10 between the date the contract was to be completed and the date
11 they walked off the job.

12 That comes out of any valid amount that they are going
13 to be able to seek.

14 They are making this allegation and I don't see how
15 it has prevented you. I think you have every right to make
16 inquiries to find out how much it cost in increased architec-
17 tual fees, for example, which occurred between the date of
18 September or whenever they say the contract was supposed to
19 be completed and the time that Fabrizio actually walked off
20 the job, and how much of that added cost was involved.

21 It seems to me that you are able to do that and if
22 you are able to do that you begin to cut costs. I would think
23 that that is what much of the cross examination of the various
24 witnesses out to be addressed to.
25

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1 gte 1

Fowler - cross

391

2 Q Dr. Fowler, getting back to the supplemental answers
3 to interrogatories, you have an increased fee for the Clerk
4 of the Works of \$23,540.18.

5 What portion of that amount is for the Clerk of the
6 Works prior to Fabrizio and Martin leaving the job or being
7 terminated by the School Board?

8 A As I recall without that information in front of me,
9 this was 13 months service between September 1965 and October
10 1966. Fabrizio and Martin defaulted in March 1966. That
11 would be eight months of it. Eight months would relate to the
12 period of time after the default of Fabrizio and Martin.

13 Q Would the same be true with the additional amount
14 sought for the architect?

15 A Which item?

16 Q That would be \$19,646.

17 A No.

18 Q What is that in connection with?

19 A That relates to his basic fee, which is a per-
20 centage of construction cost. The increase of the \$19,000
21 is the increase in that basic fee because our construction
22 costs were increased.

23 Q When you talk about construction costs, are you talking
24 about the original contract only or are you talking about the
25 original contract plus all changes and so forth that may increase

1 gte 5

Fowler - cross

392

2 the base contract cost?

3 A The latter.

4 Q So you take all of the construction cost involved,
5 actually true honest construction cost and tally them all
6 together, be they by way of change order or base contract,
7 and the architect fee is based on that amount?

8 A It is based on the actual disbursements.

9 Q Let us take a situation where a change order is re-
10 quired by reason of an error or mistake made by the architect
11 in the preparation of the contract documents or in giving a
12 directive to one of the contractors in the performance of his
13 work.

14 THE COURT: Is it really important how he arrives
15 at it? Isn't the important question, Mr. Powers, how much of
16 that \$19,000 was based upon increase in costs that occurred
17 after Fabrizio left, because there were some increase in costs
18 in that amount apparently that were approved by the Board by
19 virtue of change orders while Fabrizio was on the job?

20 MR. POWERS: I understand, your Honor. Thank you.

21 Q Can you tell us, please, Dr. Fowler, what the portion,
22 if any, of that \$19,646 amount is applicable to work performed
23 after March of 1966 when Fabrizio was terminated by the School
24 Board?

25 A I would need the exhibit.

gte 3

Fowler - cross

393

Q Which one would that be?

A It would be toward the end of Mr. Yavner's exhibits.
It is the billing from the architect.

THE COURT: Also, Mr. Powers, it would be helpful, I think, that when you get those costs if you and Dr. Fowler would try to get a figure in the record.

For example, that eight month which you talked about which apparently has reduced or has something to do with the Clerk of the Works, it seems to me it would be helpful if we got a figure as to what that meant in terms of dollars and cents in the record.

MR. YAVNER: Your Honor, I would like to make a suggestion which possibly may save time.

THE COURT: All right. I am always amenable to that.

MR. YAVNER: I accept your Honor's rulings on the interpretation of how the damages should be executed. I think that Dr. Fowler if given about no more than 20 minutes or so, he can go down the entire line without the need of questions on each item, re-execute his figures very quickly and then be prepared to give Mr. Powers a new schedule of figures, with one caveat:

He said eight months. I can only figure six and a half to seven months. But we can work that out, too.

gte 4

Fowler - cross

394

1 Q Can you do that, doctor?

2 THE COURT: Is that agreeable to you?

3 THE WITNESS: Surely.

4 MR. YAVNER: I think you can sit right down with it
5 and figure it out right now.

6 THE WITNESS: Just stop everything?

7 MR. POWERS: Can we save time and, say, we have Dr.
8 Fowler doing that and we can take another witness out of turn.
9 Dr. Sabella, I think, is here and we can take five or ten
10 minutes.
11

12 THE COURT: That will be helpful, because I think I
13 will have to take a break on another matter for about five minutes
14 at about 3:30, that's why I don't want to break now.

15 Why don't we do that. Why don't we suspend with
16 Dr. Fowler and let him do his arithematic. Obviously yours is
17 better than mine at this point.

18 (Witness temporarily excused.)

19 A N T H O N Y C. S A B E L L A, called as a witness
20 on behalf of the defendant, having been first duly sworn
21 by the Clerk of the Court, testified as follows:

22 DIRECT EXAMINATION

23 BY MR. YAVNER:

24 Q Mr. Sabella, are you the superintendent of schools
25 of the Bedford School District?

gte 5

Sabella - direct

395

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2 A I am.

3 Q For how long have you held that position?

4 A I have been the superintendent since the fall of
5 1967.

6 Prior to that I was employed by the District as a
7 School Business Administrative and as Accounting Superintendent.

8 Q Were you the school business administrator at the
9 time that the Fabrizio contract began?

10 A No, I was not.

11 Q When did you become the school business administra-
12 tor?

13 A November 1st, 1965.

14 Q Were you employed by the School Board before then?

15 A No.

16 Q Mr. Sabella, I show you this document.

17 Can you identify that, please, and tell me what it is?

18 A Well, it is a certificate by the District Clerk
19 indicating that there is an obligation here of bond anticipa-
20 tion notes for school building construction and land acquisi-
21 tion.

22 Those BANTS were--

23 Q BANTS?

24 A Those bond anticipation notes, bands--that is what
25 they are commonly called--bonds anticipation notes were on this

1 gte 6

Sabella - direct

396

2 particular document for the year April 1st, 1970 to April 1st,
3 1971.

4 The rate of interest was--

5 Q Excuse me a minute.

6 I see this states thi- is in the amount of \$1,140,000.

7 A Yes, sir.

8 Q Does this include an amount for the Middle School
9 construction?

10 A Yes, it does.

11 Q How much of this is for the Middle School construc-
12 tion?

13 A \$220,000.

14 Q Do you state that of your own knowledge?

15 A Yes.

16 Q Or does that appear on this form?

17 A It is of my own knowledge.

18 Q It does not appear on the form, does it?

19 A No, it does not.

20 MR. YAVNER: Your Honor, I offer this in evidence.

21 MR. POWERS: I am going to object to this, your
22 Honor, on the ground that I couldn't know what the interest
23 rate would be if it were just based on the \$220,000 or what
24 proof there is--I will leave it at the first, as to whether the
25 amount of interest would be the same or what have you.

gte 7

Sabella - direct

397

I also object to this on the ground that I don't think it is a proper item of damages in that it does not appear to me that a School Board can turn around and sue a contractor for \$174,000 for a loan of \$220,000 and charge them interest for a 30 year period. But my main objection is the first one, that this is apparently an item that is lumped in with other sums. I don't know what those other sums were for and whether the terms of the interest would be the same or not.

THE COURT: I think your last objection is valid, and that is that you have lumped in this \$220,000 with some other figures which you have an interest rate and, as he says, I don't know whether the interest rate would be the same.

I assume it would be, but I don't know. If he raises the question, you are required to show it.

MR. YAVNER: I think I can produce certain testimony that making this part of a larger issue tends to reduce the interest rate rather than to increase the interest rate.

The very firm that handled this, Hawkins, Delafield, I can produce them and have them, I am sure, tell us that.

Q Mr. Sabella, do you know anything on this particular subject?

A No. We were advised to put them together in the possibility of getting a better interest rate. That's why they were put together.

gte 8

Sabella - direct

398

MR. POWERS: Your Honor, if I may, another item I thought of is, I don't know that they could get a bond issue for \$220,000, whether it would be accepted, even, as being too low, and they might have been required to get the funds in a different form than they are getting them now and this might have been one of the reasons for lumping this sum in with the others.

I think this is completely improper, having this sum lumped in with other figures that we have no knowledge about.

THE COURT: As a matter of fact, I don't think in terms of the ultimate question that they are raising it really makes very much difference. If their contention is that they were required to complete the building to go on the market with \$220,000 worth of bonds, I don't see what they need the figure for in any event.

They have two people who testified to that already. Or the interest on the bond, it seems to me that that is at least arguably a measure of the damages that they have.

I don't see where you have to go through all the problems of introducing a document which does not show anything. All you really add is that the superintendent's testimony is to that effect. I think you also earlier had Dr. Fowler testify to that effect.

MR. YAVNER: Very well.

gta 9

Sabella - direct

399

THE COURT: The document you are about to introduce does not show us anything.

MR. YAVNER: I won't introduce those.

I do want to refer to one document, however.

Q Mr. Sabella, will you tell us what this document is that I hand to you?

A This is an advertisement for the sale of bonds, information for investors. It is prepared by Bond Counsel, Hawkins, Delafield and Wood, and it is then sent out to various investment agencies to see if they were interested in the purchase of those bonds.

Q I call your attention to the first two lines of the eighth paragraph of the notice.

Would you read them, please?

A "Said 1,090,000 bonds are a combined issue, including 2210,000 bonds to be issued for the purpose of finishing the construction of a school building known as "Middle School Building Complex" on a part of the Fox Lane Site in the Town of Bedford."

THE COURT: You just said it was \$220,000?

THE WITNESS: \$220,000, your Honor, was the last issue of bond anticipation notes. It was reduced by another 10,000 at the time that the bonds were put up for sale.

There was a requirement that bonds, BANTS that are

1 gte 10

Sabella - direct

400

2 out must be reduced by a certain amount that are in existence.

3 Q Mr. Sabella, I show you Exhibit 95 in evidence, and
4 I call to your attention a line on which the first column is
5 stated 1970-71.

6 Referring to the bond anticipation notes at that
7 time of \$220,000 with an interest rate of 4.6 per cent and an
8 interest paid of \$0,120.

9 Do you know whether that figure is correct either from
10 your records or of your own knowledge?

11 A Yes, sir. It is the figure that we have posted in
12 the District Office. That's correct.

13 Q And I call your attention to that part of this exhibit
14 under the heading "Bonds sold in combination with other bonds
15 May 1971," is the information there about the amount, to wit,
16 \$210,000, the percentage of total issue related to the
17 default, the total interest to be paid? Is that correct,
18 according to your knowledge or records?

19 MR. POWERS: Objection, your Honor. That is a
20 leading question. There is no indication that there was any
21 default by anyone.

22 THE COURT: Objection sustained.

23 end 5a

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2 MR. YAVNER: If your Honor please, I have
3 changed the heading on this part, "Amount relating to the
4 Middle School Construction, \$211,000. percent of total issue
5 related to Middle School construction 19.2 per cent, total
6 interest to be paid over 26 year life of Schedule, \$654,943.
7 per cent of total interest applicable to Middle School
8 construction 19.2 per cent, interest cost applicable
9 \$125,749."

10 Q Are those figures correct, to your knowledge?

11 MR. POWERS: I object to the marking up of
12 the document.

13 MR. YAVNER: No, this was not an exhibit.

14 MR. POWERS: I don't care whether it is an exhibit
15 or not. You take the document as it stands, you don't
16 mark it up and submit it as an exhibit as marked or get
17 the witness to testify from a document that you have
18 marked.

19 It is highly improper, your Honor.

20 THE COURT: I assume that Mr. Yavner knows that
21 that is improper. I will just make that assumption.

22 Apparently he is incorrect, but let us assume that
23 he does and let us go on.

24 MR. YAVNER: I apologize for that, your Honor.

25 Q Mr. Sabella, did you bring with you any records
showing the amount of interest paid on the bonds that were

1 gtg 2

Sabella-direct

2 sold in May of 1971 and the percent of that that is
3 applicable to the payment of interest on the \$210,000 of
4 those bonds that relate to the completion costs of the
5 Middle School?

6 MR. TRAGER: Your Honor, I object. He is leading
7 the witness.

8 MR. YAVNER: I asked whether he brought records
9 on that subject.

10 THE COURT: Yes, he brought the records on that
11 subject. That is not a leading question.

12 MR. TRAGER: He is getting exactly what he wants.

13 THE WITNESS: May I answer the question?

14 MR. TOPLITZ: Your Honor, may I make one further
15 objection?

16 I think this witness is testifying to costs in
17 1970 and 1971, the construction cost, if any, which were
18 incurred had to be incurred in 1966 and maybe the early
19 part of 1967.

20 There has been no contention--

21 THE COURT: Mr. Toplitz, he is testifying or
22 being asked in regard, as I understand, to bonds that were
23 issued by the School Board along with other items, \$210,000,
24 and interest that was paid upon them in certain years.

25 As I understand it-- I am not sure I do, but as I

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 Sabella-direct

2 think I understand it those were the bonds that the plain-
3 tiff is alleging they were required to go on the market
4 with in order to complete the construction of the Middle
5 School, which required them to go on the market with these
6 bonds, because of the fact that Fabrizio didn't complete
7 the job.

8 MR. YAVNER: That is our contention, your Honor.

9 THE COURT: That is what?

10 MR. YAVNER: That is our contention.

11 THE COURT: I think that is appropriate.

12 The question so far is did you bring the records.
13 What is your record?

14 THE WITNESS: Our calculations on --

15 THE COURT: You did bring records? The answer
16 is yes?

17 THE WITNESS: Yes, sir.

18 Q What are the records that you brought?

19 A Well, I have the bond payment schedule as it was
20 prepared by Chase Manhattan Bank and I have the calcula-
21 tions of what percentage of that bond issue is the \$210,000
22 Middle School portion, and we have calculated what we think
23 is the portion of the total interest that should be al-
24 located to the \$210,000.

25 Q May I have those records, please?

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Sabella-direct

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2 A Here is the bond, here is the schedule.

3 Q You mentioned several documents.

4 A All I have is our calculations on these.

5 MR. YAVNER: I offer these in evidence.

6 MR. POWERS: Your Honor, I have no objection to
7 these documents being introduced as documents received
8 by Mr. Sabella in the ordinary course of business, but I
9 do object to the accuracy of the information contained
10 therein as information that he had not prepared and cannot
11 vouch for the accuracy of as far as I know.

12 THE COURT: I thought you prepared those, Mr.
13 Sabella?

14 THE WITNESS: The bond schedule is for payment --
15 was prepared by the Chase Manhattan Bank, the bank that is
16 on that heading there.

17 I determined which proportion of that would be
18 allocated for Middle School, \$210,000.

19 THE COURT: All right.

20 THE WITNESS: A very simple process.

21 THE COURT: That is all right.

22 THE WITNESS: Does it need explanation?

23 THE COURT: No.

24 The lawyers may ask you some questions about it.
25 I am not. I am merely trying to find out whether you

1 gtg 5

 Sabella-direct

2 prepared the record. That is all I am interested in now.

3 All right, the document will be admitted.

4 By the way, Mr. Powers, did you get your other
5 exhibit marked?

6 (Plaintiff's Exhibit No. 24 received in evi-
7 dence.)

8 (Defendant's Exhibit No. 9 received in evi-
9 dence.)

10 Mr. Sabella, I show you Exhibit 98, consisting of
11 three sheets of paper, and call your attention to the third
12 sheet.

13 Would you read the entries on that third sheet?

14 Did you prepare the entries on that third sheet?

15 A Yes, sir.

16 Q Will you read the entries into the record, please?

17 A Total bond issue, \$1,090,000.

18 Middle School portion, \$210,000.

19 It is 19.27 per cent.

20 Total interest, \$654,937.50.

21 Middle School portion, \$126,206.45.

22 Q Just one more question, Mr. Sabella.

23 Did you bring with you any records relating to
24 insurance paid on this job?

25 A Well, all I have is a cancelled check on a builder's

1 gtg 6

2 Sabella=direct

3 risk policy on the Middle Schook, which the School District
4 paid, during the period July 1, 1964 to July 1, 1967.

5 This is one year's premium, which was paid August 24, 1965.

6 Q Did you have to pay any additional insurance
7 premiums thereafter in connection with the completion of
8 the school?

9 A This carried us through August 1966. There was
10 about a two-month extension of that and at that time I be-
11 lieve the policy was then canceled because we were in oc-
12 cupation of the building.

13 Q Do you know whether you paid any additional
14 premium?

15 A No, I don't know what the total premium was.

16 MR. YAVNER: Thank you.

17 I have no further questions of Mr. Sabella.

18 THE COURT: Let me make my position clear to
19 you, Mr. Yavner, so you will have no problem about it.

20 Maybe this isn't the time. It may well be when
21 Dr. Fowler gets back on the witness stand.

22 I am not convinced that the \$220,000 bond issue
23 is a valid item that can be charged solely and totally
24 for the completion of the Middle School.

25 I know that Dr. Fowler has indicated that this is
 so, but it seems to me that what you are going to have to

1 gtg 7

2 Sabella-direct

3 show at least to convince me that all of the \$220,000 in
4 bond had to be and required to be devoted solely for the
5 completion, that if the construction had continued without
6 the interruption that you would not have been required to
7 go out on the market to the tune of \$220,000.

8 I must confess that I find the evidence up to
9 this point very dubious. Dr. Fowler has made a good point
10 with regard to it, but it seems to me the evidence as far
11 as I can understand it shows that you were over-running
12 your construction costs while the Middle School, before
13 the interruption, was going far ahead of what had been
14 anticipated.

15 At least I heard a figure that it was \$105,000
16 over what was anticipated, and it can be said that maybe
17 you could have gone on because these items were in furni-
18 ture and so forth and it could have come from some other
19 funds.

20 That is a statement. That is not proof to me.

21 I think that you may validly seek damages in re-
22 spect of any bonds that you had to buy that was related to
23 completion of construction, but I think that you are going
24 to have to prove it and I don't believe you have, not at
25 this point.

 I am just telling you this now so that you can get

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gtg 8

Sabella-direct/cross

whatever other proof you think is necessary to show that these \$210,000 in bonds that you are alleging plus the \$124,000 in interest that you feel you are entitled to, that that money was solely related to the fact (1) of interruption, and (2) of completion.

All right, Mr. Powers, you may proceed.

MR. POWERS: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. POWERS:

Q I believe, Mr. Sabella, you said that you allocated the amount of the bond, total bond issue applicable to the Middle School District?

A I allocated it?

Q Yes. I believe that was your testimony.

THE COURT: You mean your calculations.

THE WITNESS: I calculated those figures, yes.

THE COURT: That is what he asked for.

Q I'm sorry, I misunderstood.

Who did allocate that \$220,000 or \$210,000 to the Middle School?

A The Board of Education made that decision.

Q What Board of Education?

A Bedford Board of Education.

Q On what basis?

1 gtg 10

2 Sabella-cross

3 was reasilly not a responsibility of mine.

4 I just don't know.

5 Q How do you plan on paying off the bonds in the
6 20 years or 30 years, whenever they become due?

7 A The bonds are paid off on an annual schedule and
8 that money is allocated in the annual budget under debt
9 service and so much of the money is a payment on the prin-
10 cipal and so much of the money is a payment of interest.

11 Q Let me ask you this: Is it your testimony that
12 the issuance of a bond or bonds was the only method by
13 which you could raise this \$210,000 or \$220,000?

14 A Those bonds -- the authorization for the sale
15 of bonds, as I understand it, had been made with the
16 original referendum by the people.

17 Q That is not my question, Mr. Sabella.

18 My question is, is that the only possible way
19 by which you could raise the \$250,000 for construction?

20 A Yes. You cannot use current budget funds for
21 construction purposes.

22 Q I didn't ask you whether you could use current
23 budget funds. I said, is there any other way?

24 THE COURT: Mr. Powers, if you are going to be
25 extensive with this witness --

 MR. POWERS: I don't believe so.

gtg 11

Sabella-cross

411

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2 THE COURT: I think that Dr. Fowler has been in-
3 convenienced enough and I do not want him to be required
4 to be here more than today.

5 I am going to try to insist that you finish
6 with him today.

7 MR. POWERS: I only have a few minutes.

8 THE COURT: If you are going to take any time with
9 this witness--

10 MR. POWERS: I don't plan to, your Honor.

11 THE COURT: You ought to suspend and get back to
12 Dr. Fowler.

13 MR. POWRS: I really don't plan on much. I'd say
14 maybe four or five more questions.
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4a pm

Og 1

Sabella-cross

Q The question was, Mr. Sabella, is there any other way of raising this \$210,000 to \$220,000?

A The School District, to the best of my knowledge, can only raise money two ways; either through the annual budget or through the floating of bonds and bonds are allocated for construction and that is the only way that I know of.

Q It cannot borrow on a short term basis, is that what you are saying?

A Only if the authority for borrowing has been approved some other way, by a bond issue being passed, and they have authority to borrow, bond anticipation notes.

Q Could not they have gotten authority from the members of the School District for short term borrowing?

A They used that method for four or five years and then there is an expiration time on those and they must then sell the bonds.

Q After you sell the bonds you are still going to have this \$250,000 to \$210,000 or \$220,000 debt. Why don't you continue the debt of Fabrizio & Martin on beyond the 30 years? How is it eliminated at the end of the bond issue?

A There is a limitation on how much you can float a bond issue. On new construction it is 30 years and on

1 Qg 2

Sabella-cross

2 renovation it is 20.

3 Q But he won't have paid back the \$220,000 at the
4 end of 30 years.

5 A The School District will have paid it off.

6 Q But not out of funds from Fabrizio & Martin.
7 My question is, why do you extend it for 30
8 years?

9 A The whole bond issue was floated for 30 years.
10 That was the authorization.

11 MR. POWERS: I have nothing further.

12 CROSS-EXAMINATION

13 BY MR. TRAGER:

14 Q This was already previously authorized, this
15 bond issue. That was with the original bond issue, I
16 take it?

17 A There was a bond issue passed for \$4,050,000 I
18 think, which was the original bond issue.

19 Q Of which an agreement was made to spend only
20 or issue only \$3,030,000 in bonds or aren't you familiar
21 with that?

22 A I am not familiar with that agreement or even
23 how it came about if it existed.

24 Q So I get something straight in my mind, the
25 reasoning for waiting until May 1971 was that the \$220,000

1 Qg 3

Sabella-cross

2 was an accumulation of the amounts raised by bond antici-
3 pation notes, is that it, the bans that you referred to?

4 A The original BANTS that you referred to?

5 A The original BANTS were \$250,000 and they were
6 decreed to \$10,000 over the last three years and then
7 they had to be retired.

8 Q And that rolls back to 1966 when the last payment
9 was made; that is, under this contract? Is that how the
10 220 arose initially?

11 A There was authorization for the Board of Educa-
12 tion to spend \$250,000 in bonds. That is in construction.

13 Q But what did it represent, the \$25,000?

14 A I don't understand what that means.

15 Q What did the \$250,000 represent? What is the \$250--

16 A To over increased construction costs, as I under-
17 stood the problem.

18 Q As represented by what? What is the 250 in in-
19 creased construction costs?

20 Do you know what the 250 is that you are testify-
21 ing to?

22 A Do I know what the 250 is?

23 Q Yes, increased construction costs?

24 A I don't know those costs in detail, not at all.
25 I was not involved in this project. I have been called

1 gtg 4

 Sabella-cross

2 here, I understand, to testify as to when the bond an-
3 ticipation notes were converted to bonds and what I knew
4 about the financing of that, that is all.

5 MR. TRAGER: Thank you.

6 THE COURT: The witness is excused.

7 (Witness excused.)

8 THE COURT: We will take a short recess.

9 (Recess.)
10

11 ...

12 C H A R L E S W. F O W L E R, resumed.

13 CROSS-EXAMINATION (continued)

14 BY MR. POWERS:

15 Q Dr. Fowler, before the break you were going to
16 review the claims for increased costs of the Clerk of the
17 works and the architect and any other items of additional
18 costs that you are making claim for that have anything
19 to do with the construction of the school.

20 Have you analyzed your figures to determine
21 what portion of these costs are applicable to the period
22 subsequent to March 1966?

23 A Yes.

24 Q Would you give us those costs, please?

25 A With respect to the clerk of the works it would
 be six months, March through August, at a monthly rate

Fowler-cross

Q March through August? I thought it was through October.

You were talking about 13 months?

A The clerk of the works disbursement for Mr. Beardsley went through August. Mr. Beardsley left our employ at the end of August 1966. During September and October and November Mr. Pine, who was on our staff, served as the clerk of the works. We had not allocated any of his salary against this and I have no way of determining how that can be done. I eliminate that from our consideration.

0 With respect to the amount of \$23,504.18, what period does that entire amount cover?

A It is a different period for each of the three items in there.

Q Increased cost for clerk of the works, architectural supervision and insurance, there are three items?

A Right.

Q Let's break that out. What portion of that is for the clerk of the works?

A Now you are referring to the original figure?

Q No, this is in the supplemental answers, \$23,504.18.

A You are not now asking me for my new calculations?

1 Qg 6

2 Fowler-cross

3 Q No, I am asking you for your original calculations.
4

5 A \$15098.41 was the original calculation for the
6 clerk of the works.

7 Q What period of time did that cover?

8 A It represented the payments to Mr. Beardsley from
9 September 1965 through August 1966.

10 Q That is basically one year, 12 months?

11 A Right.

12 Q And his salary was really about \$15,000 a year?

13 A Right.

14 Q Breaking that figure down, it actually splits
15 in months, six months before and six months after the
16 March date, is that the way it is?

17 A That would be correct.

18 Q So half of that \$15,000 is for the period subse-
19 quent to March 1966, would that be correct?

20 A Using that approach, I have a discrepancy and--
21 in the figures which I can't explain. He gets \$1334 a
22 month for six months and that adds up to \$6,004.

23 Q If it is six months and I divide that \$15,098.41,
24 is that the figure?

25 A Yes.

Q I come up with \$7,549.20 if I divide by two.

Og 7

Powler-cross

Would you accept that figure?

A I think it can be done either way. That figure that I used, the \$15,000 was taken from the actual account card.

Q If you divide that by two you come up with the correct figure?

A Fine.

Q Unless my division is wrong it is \$7,549.20. What portion of that \$23,000 figure is for architectural supervision?

A In the original \$23,000 figure there was \$5,706.16.

Q What is that?

A \$5,706.16.

Q Going back to Exhibit B, and I'm sorry to delay here, of the original answers to interrogatories--

A I have Schedule 1.

Q Down the bottom, page 3 of Schedule 1, it says Exhibit B on the top of the page.

A Yes.

Q This \$23,000 figure on the supplemental answers supersedes this Schedule 1, page 3, would that be correct?

A Yes. You can see where it's been crossed out and the new figure adds up to \$23,000.

Q All right, fine.

Qg 8

Fowler-cross

I know what we are talking about.

The architect supervision is \$5,706.16.

What portion of that is for the period subsequent to March of 1966?

A All of it. Except that I would make this notation.

In reviewing the architect's bill I find that the \$5,000 is contained as a credit within the \$19,000. I have only had a little while to think of this looking at the bill this way. It seems to me that that item is covered in the \$19,646 and should not be within that \$23,000 figure.

pge 1

Fowler - cross

420

Q We should eliminate that 5,706 and reduce the 23504.18 by that amount?

A They billed us for \$5,706 for extra supervision supervision between April and October. But in arriving at their \$19,000 figure due them in their last payment they gave us credit for that.

It seems to me that it is in there twice and it should not be.

Q Then that would reduce the \$23,504.18 to \$17,798.18.

A Repeat that.

Q It will reduce the figure of 23,504.18 to \$17,798.18. I am taking out of the \$23,000 the 5,706 because you say that is a duplication.

A Just that one item alone?

Q Yes.

A All right.

Q As far as this \$23,000 figure is concerned we can exclude architectural supervision and you are not making any claim there because it is provided for elsewhere.

A Yes, under the architect's fee.

Q The third portion of that \$23,000 figure is insurance and that is \$2,699 and what portion of that is applicable?

A It would appear eight months if you begin with March through October when substantial completion occurred.

1
2 Q Is that when the policy was cancelled?

3 A Mr. Sabella stated that, I think, in his testimony.
4 Dividing the annual premium of \$2699 you get a monthly cost
5 of approximately \$225 for eight months which would be \$1800.
6

7 Q So then that reduces the insurance from \$2,699 to
8 \$1800, is that correct?

9 A Correct.

10 Q Then when we tally them altogether the 23,504.18 figure
11 actually becomes \$9,349.20, is that correct?

12 A Yes, I believe so.

13 Q I am adding the 7,549.20 for the Clerks of the Works
14 which you claim is applicable and the 1800 for insurance, which
15 tallies 9,349.20.

16 A Correct.

17 Q We have an increase in the architect's basic fee
18 of \$19,646.03 to which you made some reference in your prior
19 answers. What portion of that sum is applicable to the period
20 subsequent to March of 1966?

21 A I think this is best described in exhibit 19B. As I
22 testified, the architect's fee is determined by applying a
23 percentage, in this case 6.15 per cent, against the total con-
24 struction cost. So if you take all of the contractors on the
25 job, both before and after, add up the total construction, they
apply the 6.15 per cent against the 3.9 million dollars in con-

Page 3

Fowler - cross

422

struction arriving at a fee of 243,000 against which they credited our payments to them and submitted them this final bill.

Q To what does the figure come out to?

A 19,646.03.

Q The School Board did not pay 19,646.03, did it?

A To the best of my knowledge, we would have paid 234,636.

Q Do you have your records on that? Because as I recall from the pretrial discovery there was a sum of 2,000 or better dollars that was never paid to the architect.

A It is possible this retainage has not been paid, the difference between those two figures which would be approximately \$2,000.

Q I recall there was a discrepancy between the amount billed and the amount paid. Do you have your records with you?

A This is the only record which I have which shows that their last requisition submitted was 17. Our obligation is 19.

Q It depends what you are paying and not your obligation.

A I think the account cards show that.

Q Can we take the \$19,000 figure which is the amount they requisitioned?

1
2 THE COURT: I disagree with you. I think it would
3 include more than an obligation to pay for the architectural
4 and construction costs at least under their theory. Construc-
5 tion costs that occur, it seems to me that that is one of the
6 things they claim damages for.

7 MR. POWERS: The statute of limitations has run even if
8 the architect wanted to sue them even if they had not been
9 fully paid.

10 THE COURT: Then there is no obligation.

11 MR. POWERS: There is a moral obligation, but I
12 assume no legal obligation.

13 I am mistaken.

14 Q Dr. Fowler, looking at this item number 5, less
15 payments received against basic fee, item number 5 says extra
16 supervision, April to October 1966, 5,706.16. Could you tell
17 me please how you determine that \$19,000 which you say was the
18 balance of the total fee is applicable to the period subsequent
19 to March of 1966? It may not have been paid but that does not
20 mean that it is for work furnished subsequent to that date,
21 does it?

22 A The principal part of that, if not the entire amount,
23 is related to our increased construction cost. The architect's
24 fee, 6.15 per cent applied against the increased construction
25 cost.

jge 5

Fowler - cross

424

Q All I see here is the extra supervision subsequent to March as being \$5,706.

A That is a payment we have made because our payments for whatever purpose are deducted against the total amount which the 6.15 per cent are derived.

Q This lists the invoices, April to October '66 is extra supervision, invoices 3844, 46, 50, 52, and 54. Those for 38 apparently is for the month of April. 44 is for May. 46 is for June and so forth up to October and the total cost is 5,706 for the period after March of 1966, wouldn't that be correct?

A For extra supervision.

Q Right.

A But you have to pay the architect not only for supervision but a percentage of the total construction cost. The total construction cost after Fabrizio left the job increased in the letting of contracts to Mars Normel and MacNamee and Bradhurst so the 6.15 per cent must be applied against the total cost to complete this project. That was our agreement with the architect.

THE COURT: To arrive at the figure that would be chargeable to Fabrizio, it seems to me, that you have to compute not only the extra supervision but you have to charge the architect's fee against whatever the cost of construction

jge 6

Fowler - cross

425

was at the time Fabrizio left and reduce that under the total and you get your fee.

We have the added costs and that kept growing or changing.

At some point, as I understand it, all those costs, the architect was entitled to get a certain portion of that, a percentage of that would be his fee. You compute that and then you get that figure plus the fact whatever you say was chargeable in terms of extra supervision. It seems to me that's how you arrive at the figure.

Q You just take the extras and take the percentage on that and not the basic contract price because that was part of Fabrizio's work to start with.

THE COURT: You can't take the contract price because the basic contract price had increased apparently by virtue of mutual agreement.

THE WITNESS: We had been paying for that all along.

THE COURT: The architects were entitled to a portion of that. But by the time Fabrizio left, however, that increase had come, you would take your percentage from that.

THE WITNESS: Yes, from the point which Fabrizio left. If he conjectured that he had stayed they would have gotten 6.15 per cent on his contract and change orders as it stood then.

jpe 7

Fowler - cross

426

The question is what is the difference between that contractin change orders and our actual cost construction and at 6715 per cent as against that.

THE COURT: All right.

THE WITNESS: I think we agreed as to how we arrived at it. I am not sure how it relates to this bill. I think we can demonstrate what Fabrizio's contract and change orders were at the time he left the job and we can demonstrate how much we paid for the construction.

MR. POWERS: I don't think that is the applicable figure because whether Fabrizio was paid or not these charges for the basic contract price plus all change orders issued while Fabrizio was working were part of the School Board construction cost and have nothing to do with any additional expenses that the School Board might have incurred.

2 THE COURT: You have to take what was paid plus the
3 change orders agreed upon in terms of those, add all those
4 figures up by the time Fabrizio left and then take your per-
5 centage of that and then reduce that, whatever that is, from
6 the total and you get your figure.

7 MR. YAVNER: Your Honor, may I just say that I agree
8 with what you said and I go one step further on Mr. Powers said:

9 I think to do it properly and equitably, not only
10 must you take those figures, but you even have to add in--was
11 it requisition 22, the one that never reached the Board because
12 Fabrizio had walked off, but Fabrizio had done that work? I
13 think you have to give Fabrizio credit for that.

14 Is that right?

15 MR. POWERS: Actually, I think we are only talking
16 about \$20,000 or \$50,000.

17 MR. YAVNER: I am lost on the figures. I don't know
18 what we are talking about. But as a matter of principle I
19 think you do deserve credit for that particular requisition which
20 was never paid.

21 MR. POWERS: Couldn't we do that by just taking the
22 Mars Normel change order, the Bradhurst change order and the
23 MacNamee change orders, tally them together and whatever the
24 amount of those change orders are you take 6.18 per cent or
25 whatever percentag3 is and that's the amount you come up with?

gte 2

Fowler - cross

428

THE COURT: Plus the \$5,000.

MR. POWERS: Plus the \$5,000, correct, your Honor.

That is a mathematical thing which you can try and do and come up with it later. I don't think we should burden the Court with doing it now.

THE COURT: Yes, please, don't.

All I can do is the formula, I can't execute it.

MR. POWERS: I am grateful that you can do that. I can't.

Q Are there any other additional costs?

A I don't think that the other items relate to the change in the time sequence. All of the \$85,000 were items after Fabrizio left the job. Delay claims, we aren't dealing with those things.

The architect's basic fee, we mentioned that. Liquidated damages we are not dealing with.

Q Doctor, I show you this letter from the architect to Dr. Lynch, dated October 28, 1964, and ask you if you can identify that.

A Yes.

MR. POWERS: May we have this marked as the next exhibit?

(Plaintiff's Exhibit number 25 was received in evidence.)

gte 3

gte 3

Fowler - cross

429

Q Doctor, in this letter--if I may paraphrase it briefly--the architect goes into the fact that there had been delays on the job and that the installation of the footings and the pouring of the concrete had been delayed for one reason or another, is that not correct?

You can paraphrase it differently if you like.

A Well, Mr. Shappa explains how Fabrizio and Martin's progress schedules are and working is at the point where it is now.

Q For whatever the reason may be.

On the last page does he not conclude that based on the schedule of when the work will be done--and he is doing this as of October of 1964, based on when the schedule of things will be done, the school will not be finished before the fall of 1966.

A Complete occupancy will begin with the fall term of 1966.

Q And that is actually when complete occupancy was had, was it not?

A That's correct.

Q I show you a copy of a telegram dated November 30, 1964 from Fabrizio and Martin to the architect and ask you if you can identify that, please.

A This telegram is part of the Board records.

1 MR. POWERS: May we have this mared.

2 MR. YAVNER: Your Honor, this is the same discussion
3 that we had before about what were the quarrels between the
4 parties prior to March of 1965 when they entered into the sup-
5 plemental agreement when they resolved these quarrels.
6

7 No, I think we are back to it and I don't understand
8 really why we continue having this.

9 MR. POWERS: Number one, Mr. Yavner still is of the
10 impression, apparently, that the supplemental agreement is
11 part of this case.

12 MR. YAVNER: No, I am not.

13 MR. POWERS: Number two, this has to do with the non-
14 payment of requisition monies and a complaint about where they
15 are and it has nothing to do with a dispute of delays or any-
16 thing else, it is a question of where are my monies.

17 MR. YAVNER: And it is one of the issues that was
18 raised and resolved in March of 1965 through the supplemental
19 agreement. It is one of those issues. All of these problems--

20 MR. POWERS: The supplemental agreement is not in
21 evidence and the Court has refused to permit it in evidence.

22 The rights were waived under that supplemental agree-
23 ment. I mean, no rights were waived with respect to that under
24 the supplemental agreement.

25 MR. YAVNER: Your Honor, what I am forced into if he

gte 5

Fowler - cross

431

1 does this and this evidence is permitted is I have to show
2 all the counter evidence in those months in 1964 on the Board's
3 side. I don't know what this is for.
4

5 THE COURT: What is this for?

6 MR. POWERS: Your Honor, I--

7 THE COURT: I thought we had resolved that with the
8 agreement that there wasn't going to be any claim for any
9 delays and so forth and so on. What is the purpose of this?

10 MR. POWERS: That has nothing to do with delays,
11 your Honor, this has to do with non-payment of monies.

12 We were talking about and I think have been talking
13 about here the equities and inequities involved in this case.

14 THE COURT: You are introducing this in order to
15 show that there was some justification for leaving?

16 MR. POWERS: Yes. This condition existed throughout.

17 THE COURT: Mr. Yavner says that this was a problem
18 that was resolved sometime after this was entered into by a
19 mutual agreement.

20 MR. POWERS: Your Honor, my recollection is it was
21 not resolved by any supplemental agreement and the Court has
22 already determined that the supplemental agreement is void
23 and invalid and isn't a part of this case.

24 THE COURT: Yes, of course it is void and invalid as
25 a binding agreement, but the point is that it also goes to the

pte 6

Fowler - cross

432

equities whether these issues were resolved that you are raising here now.

Then what we have to move on from is from time of that resolution.

You can contend, I suppose, after this matter was resolved that the Board continued to be tardy in requisitions and so forth. But it does seem to me if what Mr. Yavner indicated is correct that this predates the time when the parties sought to resolve the problem, then I think that the equities would require that you go beyond that period of time, unless you are contending that no such meeting of the minds occurred.

MR. POWERS: Your Honor, I would just like to quickly check the supplemental agreement on that point.

THE COURT: All right.

(Pause.)

MR. POWERS: Your Honor, if I may, I am referring to the supplemental agreement, and it says, "The contractor hereby releases the Board from any and all claims or causes of action for damages sustained or incurred by the contractor," then it goes into exceptions.

I am not trying to show here that I sustained damages, I am just trying to show a course of conduct by the Board in continuously fairly and refusing to make payments to the contractor or making delayed payments to the contractor and putting

1 gte 7

Fowler - cross

433

2 him in a position where he just was not receiving sufficient
3 funds so that he could finish the project.

4 THE COURT: This is very simple. The issues that
5 if you had a dispute about requisitions which you are trying
6 to put in and if there is an item in that agreement that said
7 that these matters are going to be handled satisfactory or
8 in such and such a manner and the parties sign it, that settles
9 it.

10 If that is not in the agreement, if that is not a part
11 of that, then it does appear to me the equities entitle you to
12 show that you weren't paid in a period of time, that you had
13 difficulty getting your funds.

14 I haven't seen this. I understood from Mr. Yavner
15 that that kind of problem was resolved and agreed.

16 MR. YAVNER: It was.

17 THE COURT: If you show me it wasn't, then--

18 MR. POWERS: It was not, because all we settled were
19 claims for damages prior to March of 1965.

20 THE COURT: This is an issue nobody has to argue
21 with me or convince me. What I want you to do is show me some
22 facts.

23 Where in the agreement, if there is anything in the
24 agreement, that covers it or does not cover it? That is a
25 simple issue.

gte 8

Fowler - cross

434

1 MR. POWERS: I showed the original contract documents
2 provided for payments to be made within a certain period of
3 time and that is already in evidence, that payments were to be
4 made within ten days.
5

6 THE COURT: I understood from testimony I think from
7 Mr. Crane, the architect, that there were some problems of
8 delay and the parties met and they resolved that. If it is
9 in there then that does not meet your problem. If it is not in
10 there, Mr. Powers, you have a right to show that.

11 MR. YAVNER: At page 32A of the record on appeal
12 in the Aetna appeal to the Circuit Court of Appeals, it appears--

13 THE COURT: Don't give me that. We are talking now
14 about the supplemental agreement.

15 MR. YAVNER: In summary, this is the supplementary
16 agreement.

17 THE COURT: Then put that in the record.

18 MR. YAVNER: The supplemental agreement is printed
19 in the record on appeal in Board of Education against Aetna
20 Casualty and Surety Company.

21 THE COURT: Where is it? Where is it?

22 MR. YAVNER: And it appears at page 38 on the record
23 on appeal.

24 In paragraph G of the recitals, which appears at
25 page 32A is reference to the only requisition unpaid. The

gte 9

Fowler - cross

435

1 requisition for the month of December and the contractors pro-
2 test about the architect's refusal to certify and pay that,
3 and that for that reason the contractor had suspended perfor-
4 mance of its work under the contract.
5

6 That is recital on which both parties agree.

7 In the text of the agreement itself, in reference to
8 that, is a statement at page 42A of the record under article
9 5 of the agreement, "within five working days after the con-
10 tractor's resumption of work hereunder, the Board shall arrange
11 for the certification, in whole or in part, in TAC's discre-
12 tion, reasonably to be exercised, of the contractor's requisition
13 heretofore submitted for the month of December 1964.

14 The Board shall make payment of the said requisition
15 as certified within five calendar days after its acceptance of
16 either the said certification or the Bond or letter relating
17 to San Marco Construction Corporation."

18 That involves a separate thing.

19 THE COURT: If that is all that is in there, then I
20 am afraid that I have to agree with Mr. Powers.

21 What Mr. Powers is trying to do and what I think he
22 is entitled to do is to attempt to show a course of conduct
23 which were delays in getting paid and holding up requisitions
24 and so forth.

25 I had assumed by virtue of your statements that what

gte 10

Fowler - cross

436

that agreement would recite would be that there would be no longer requisitions held up, that we will pay them on time and so forth and so on.

MR. YAVNER: No, no.

THE COURT: Don't "Oh, no, no," Mr. Yavner. That's what I assumed would be in this matter which would, therefore, meet the problems in terms of the equitable considerations which Mr. Powers is seeking to bring out. But that is not in the agreement.

There is nothing in the agreement that says that the Board is going to, in the sense do right from here on after and pay up on time, which is what the plaintiff's are complaining about.

There is nothing in the agreement about that.

MR. YAVNER: Of course not, your Honor, because that agreement confirms that it was Fabrizio that was doing wrong by the Board and not the Board that was doing wrong by Fabrizio.

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MR. POWERS: To the contrary.

MR. YAVNER: What is being debated is the whole issue again. We won the argument on the agreement.

MR. POWERS: To the contrary.

THE COURT: You have every right show how much of a bad fellow Fabrizio was and he has every right to show -- that is what the lawsuit is about, in part -- and what a bad fellow you were.

The point is he has a right to show a course of conduct. From what you read in the agreement, that agreement has not satisfied.

All right, I thought we could cut this short, but apparently not.

MR. YAVNER: Excuse me, you are on this telegram and I don't think has been marked.

MR. POWERS: I offer it as Plaintiff's Exhibit 26.

(Plaintiff's Exhibit 26 received in evidence.)

THE COURT: Do you need any more on this point other than a showing at various times that your requisitions were held up and so forth?

MR. POWERS: I can do that through my own witness, yes, your Honor, and I can, and change orders.

THE COURT: It might be possible to get an

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Fowler-cross

2 admission from Dr. Fowler on that, I don't know, without
3 the necessity of reproducing a great of documents on it.

4 MR. POWERS: I can do that, your Honor. I will
5 forego a good deal of this information.

6 Q I show you a budget as per Clerk's Report dated
7 January 31, 1965, and ask you if you can identify that
8 document.

9 A To the extent that I can read the figures, this
10 appears to be a report from our office.

11 Q It is not the best of copies.

12 MR. POWERS: I offer this.

13 (Plaintiff's Exhibit No. 27 received in evi-
14 dence.)

15 Q Doctor, I will ask you if you have previously
16 seen this proposed savings of May 21, 1965?

17 A Yes.

18 Q Referring to Exhibit 27, I ask if you would read
19 aloud item 1 on page 2.

20 A "There are pending change orders for Fabrizio &
21 Martin of approximately \$221,850. Other claims from
22 Fabrizio & Martin not approved by TAC amount to \$150,000,
23 but TAC indicated a possibility of \$50,000 of this amount
24 in October 27, 1964 communication."

25 Q What is done in this report is that there is

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Fowler-cross

\$50,000 placed under the caption of Possible Claim?

A It appears that is the case, yes.

Q And this memo is January 1965?

A It says January 31, 1965.

Q And refers to a memo of TAC of 10/27/64.

A That is correct.

Q And no action apparently had been taken in the interim?

A I have no way of knowing from this document.

MR. POWERS: I would like to offer this in evidence.

(Plaintiff's Exhibit No. 28 was received in evidence.)

Q Doctor, I show you the minutes of the regular meeting of the School Board, dated April 13, 1966, and ask you if you can identify this.

A These are two out of seven pages of those minutes.

MR. POWERS: I would like to offer this in evidence, please.

(Plaintiff's Exhibit No. 29 received in evidence.)

Q Doctor, getting back to Plaintiff's Exhibit 28, which is the document entitled "Proposed Savings" and dated

1 gtg 4

 Fowler-cross

2 May 21, 1965, could you tell us what that is, please?

3 A I cannot tell whether these are identical, but
4 this would appear to be two or three sets of proposals
5 on ways in which construction costs could be limited or
6 reduced in connection with the construction of the school.

7 Q And do you recall as of that date, May 1965, the
8 School Board was still looking for ways to reduce the size
9 of the project and dave costs?

10 A I cannot recall that specifically in terms of
11 May 1965, but I am familiar with these sheets.

12 Q And that was the purpose of preparing this memo?

13 A That is correct.

14 Q To find ways of cutting cost and saving money,
15 correct?

16 A That is correct.

17 Q Referring to Plaintiff's Exhibit 29, as you
18 pointed out, we just have the first page and the seventh
19 page. These are minutes of a meeting of the Board of April
20 13, 1966.

21 I ask you to read Resolution 33, please.

22 A "MR. Hart moved and Mrs. Levine seconded the fol-
23 lowing resolution:

24 "Resolved: That the Board counsel be authorized
25 to prepare agreements with Daniel F. MacNamee Company and

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Powler-cross

Bradhurst Site Development Corporation for completion of site work for the Middle School at a cost not to exceed \$117,500, and that the Board president be authorized to execute these agreements on behalf of the Board.

"Unanimously approved."

Q Dr. Fowler, if you turn to Schedule 1, page 2 of the original answers to interrogatories, which are appended to the supplemental answers, the figure in the resolution is \$117,000, correct?

A \$117,500.

Q Is it not a fact that that \$117,000 refers to the \$62,000 parking and curbing contract with MacNamee, the \$25,500 General Site Developing contract with MacNamee which ultimately wound up as being \$19,028, I believe, and also the Bradhurst contract of \$29,329?

A It would appear to, yes.

Q And there is no resolution there with respect to the miscellaneous site work for which you are claiming \$20,000?

A It is not covered here.

Q I show you this report from you to Messrs. Crane, Beardsley, Telfer and Sabella, and ask you if you can identify that.

A Yes.

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Fowler-cross

2 MR. POWERS: May we have this marked as the
3 next exhibit, please.

4 (Plaintiff's Exhibit No. 30 received in evi-
5 dence.)

6 Q Dr. Fowler, is it not a fact that at the time
7 Fabrizio & Martin's contract was terminated that Fabrizio
8 & Martin had materials and equipment on the site which the
9 School Board would not permit it to remove?

10 A That is correct.

11 Q And was a tally of this equipment and material
12 prepared by the School Board?

13 A It was.

14 Q And do you have a copy of that tally, to your
15 knowledge?

16 A Yes.

17 Q I show you this document that has been handed
18 to me by Mr. Yavner, and ask you if you can identify it.

19 A Yes, I believe this was part -- this was addendum
20 7 to our bidding for the completion work.

21 MR. POWERS: May we have it marked, please.

22 (Plaintiff's Exhibit No. 31 received in evi-
23 dence.)

24 Q Isn't it a fact, Doctor, that the equipment that
25 is listed on that exhibit was equipment that was owned

1 bgb 7 Fowler-cross
2 by Fabrizio & Martin?

3 A I don't know who owned the equipment. He was
4 using it.

5 Q At least he was using it.

6 When the school was completed, was any attempt
7 made to return that equipment to Fabrizio & Martin?

8 A No.

9 Q None whatsoever? What happened to that equipment?

10 A It was put up for bid, for sale.

11 Q You mean the school sold it?

12 A Yes.

13 Q And they received money for it?

14 A I don't have the specifics of that. That infor-
15 mation is here, though, some place, also.

16 Q Wasn't there a provision in the original contract
17 documents that the equipment was to be returned to the
18 contractor?

19 A I don't know.

20 Q Doctor, do you recall at the time of Fabrizio's
21 termination a Mr. Oliver Gerzof and a Mr. Joseph Fabrizio
22 attempted to remove certain personal property from their
23 trailer that was on the site and they were arrested at the
24 order of some member of the School Board or on behalf of
25 the School Board?

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Fowler-cross

2 A I recall the circumstances generally.

3 Q And do you recall who ordered their arrest?

4 A No.

5 THE COURT: What difference does that make? I
6 can see the issue of the taking of the equipment but what
7 difference does it make who ordered it or what, Mr. Powers?

8 MR. POWERS: Your Honor, I just think, again, this
9 goes to the equities to show the type of people that
10 Fabrizio & Martin were dealing with that here a man went
11 back to his own trailer to get his own personal property
12 and was put in jail.

13 THE COURT: It seems to me that when they have
14 taken the equipment for whatever their reason was for taking
15 the equipment, I think you have shown that they took
16 equipment from you. I gather you are going to try to prove
17 some value for it.

18 MR. POWERS: Yes, I am.

19 THE COURT: But they took the equipment. What do
20 you need the rest of it for?

21 MR. POWERS: Personal liberties is more important
22 than personal property.

23 MR. YAVNER: I stopped objecting after your ruling
24 before, but what is happening here is -- I am going to
25 be forced to put in a heap of material in contradiction and

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Fowler-cross

rebuttal as to all of this. Like this man who was arrested and--

THE COURT: Mr. Yavner, that is what the lawsuit is about. You put in a great deal of material and Mr. Powers is putting in material.

Now, don't tell him that he can't put it in because you are going to have to put in other things.

MR. YAVNER: I think it is irrelevant.

THE COURT: It is not irrelevant. It is no more irrelevant in terms of the theory that the plaintiff has in his case than your theory that you are entitled to have added costs.

What they are trying to show here is that they had equipment that belonged to them that you took and, therefore, that should be reduced from whatever damages you have.

It is a perfectly legitimate point.

All right, let us proceed.

Q Dr. Fowler, do you have any records with you indicating what the School Board received for this equipment?

A Mr. Sabella brought those down with him, but where they are now-- they are in a folder somewhere on that table. I will have to look for them.

gtg 10

Fowler-cross

Q All right, I will do it another way.

THE COURT: Let somebody else do it, Mr. Fowler. I am feeling guilty about keeping you around. It has gotten to be five o'clock. I would like to get you back to Illinois.

MR. POWERS: No further questions.

THE COURT: It is impossible for me to make my meetings.

I don't want you around tomorrow.

Mr. Trager, do you have any questions of this witness?

MR. TRAGER: Yes.

CROSS-EXAMINATION

BY MR. TRAGER:

Q Dr. Fowler, I am going to refer back to the testimony with respect to the bond, the damage or the interest that is allegedly in these supplemental interrogatories, 174 covering the \$250,000 of increased construction cost.

A Yes.

Q Doctor, I show you this memorandum. I think you previously identified it, but it was not put in evidence. Do you recognize it?

A Yes.

Q That memorandum is dated as of when?

1 gtg 11 Fowler-cross

2 A April 12, 1966.

3 Q And this was after the construction contract was
4 re-bid or was executed with Mars-Normel?

5 A It certainly is after the bidding. I assume it
6 may also be after the execution of the agreement.

7 Q The memorandum contains a calculation of figures
8 as calculated by you in which you go into the need for the
9 \$250,000 in additional moneys which is the subject matter
10 of the additional interest here, is that correct?

11 A That is correct.

12 Q In that memorandum you indicate that of the
13 \$250,000 or the \$250,000 was necessitated by \$156,000
14 being increased cost of rock excavation, is that correct;
15 check the second page on the top.

16 A I think what I indicate is that the cost of rock
17 excavation has required the transfer of funds from the
18 furniture and equipment account to construction costs.

19 Q But what you are doing is explaining the need for
20 the \$250,000, the \$136,000 in additional rock excavation
21 and an original, I believe you use the figure 284 for
22 equipment and furniture and an approximate cost more nearly
23 estimating 400,000 for equipment and furniture, is that
24 correct?

25 A That was what the administrative staff had

1 gtg 12

Fowler-cross

2 indicated the cost of equipping would be, that is correct.

3 Q Later on in the memorandum, Doctor, don't you
4 refer to some testimony that you previously gave with re-
5 spect to the original bond issue? You said it was
6 \$4,050,000?

7 A That is correct.

8 Q And that there was an agreement amongs the Board
9 not to ask for bonds in excess of \$3,800,000?

10 A Not to issue bonds.

11 Q Refer in the memorandum to page 4, in which you
12 give as a summary for recommending that an additional bond
13 issue be floated for \$250,000, you indicate there that the
14 Board was of the mind to ask for this prior to the de-
15 fault of Fabrizio, is that not correct?

16 Take a look at the bottom.

17 A I indicated that the president of the Board, act-
18 ing as an individual on the 2nd of March, made a statement
19 to that effect.
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Fowler-cross

Q And in the A part of it you said the request for this bond issue could be justified, didn't you?

A Yes, I said the need can be clearly and simply substantiated.

Q And based on your breakdown of 136 rock extra and a shortage in the furniture allocation?

A Based on the \$136,000 plus the estimated excess completion cost of \$114,000.

Q But the \$136,000 was not part of the Fabrizio contract, was it, the rock extra, that extra cost in construction? If it was an extra it was an extra to be added to the contract?

A Correct.

Q And was by no reason an increased cost incurred by reason of Fabrizio and Martin, was it?

A That figure at that time was not. This was an estimate on April 1966.

MR. TRAGER: I would like to mark this in evidence.

(Defendant Aetna Exhibit A marked for identification.)

MR. TRAGER: Any objection?

MR. YAVNER: No.

(Defendant Aetna Exhibit A received in evidence.)

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Fowler-cross

Q Doctor, I think you have previously seen this document.

A I have already identified it today.

Q It was not marked for identification, was it?

A I don't believe so, no.

MR. YAVNER: I would like to know for what purpose counsel wants to put this in. This is one of the basic documents, if not the basic document, which led to Judge McLean's decision that the contract is illegal.

I think that is all that this document goes to. If that is the sole purpose--

THE COURT: What is the document?

MR. TRAGER: It is a confidential memorandum. This is written in January of 1966 subsequent to the original contract, the default of Fabrizio, giving a chronological summary of what happened in connection with the contract and I address myself to Mr. Yavner's objection that at issue here is the underlying equities and the Circuit Court of Appeals clearly mandated that.

THE COURT: You mean this is a chronology by the School Board of what occurred?

MR. TRAGER: This is Dr. Fowler's memorandum to Dr. Ahlf showing exactly what happened.

THE COURT: All right.

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2 Fowler-cross

3 MR. YAVNER: I have no objection to it as a
4 document. It is in the record in McLean's Court and in
5 the files of the Federal Court here.

6 I think it is no longer relevant to the issues
7 here. However, that is my sole objection.

8 THE COURT: I don't believe that is correct.
9 I think that all of you up to this point, you, Mr. Powers
10 and now Mr. Trager, have been talking about what happened.

11 Let it in.

12 (Defendant Aetna Exhibit B received in evidence.)

13 Q Referring to Additional Defendant Exhibit B,
14 the memorandum, this goes through the whole history of
15 the construction of the Middle School from beginning to
16 end.

17 MR. YAVNER: From beginning to a point, not
18 to the end.

19 MR. TRAGER: The bitter end is being unfurled
20 now.

21 Q Dr. Fowler, in there you refer to, I think, a
22 document previously admitted into evidence. That was the
23 letter of March 10, 1964, from the architect to Mr. Carter,
24 the attorney for the School Board.

25 That is an exhibit attached, is it not?

A Yes. It is. This is from Mr. Harkness to Mr. Carter.

1 Qg 4

Fowler-cross

2 Q This letter --

3 A Yes, that is it.

4 Q That Exhibit that you have there also contains
5 a letter that you wrote on March 17, 1964, do you find that?
6

7 A Yes.

8 Q And March 17, 1964 was the date of execution of
9 the contract, is that correct?

10 A Yes, that is correct.

11 Q And in the letter of March 17, that is directed
12 to who, Dr. Fowler?

13 A My letter of March 17 is directed to Mr. Van
14 Allsberg, Board of Education President.

15 Q Would you read that letter, please?

16 A The whole letter?

17 Q Yes.

18 A "Dear" --

19 Q You said it is a letter to Mr. Van Allsberg.

20 A "Dear Mr. Van Allsberg,

21 "Dr. Lynch informed me last evening that Mr. Carter
22 had requested that the seal of the School District be de-
23 livered along with some other materials to Mr. Carter's
24 office this afternoon for your use in signing certain
25 contracts as Board President with the contractors to be
employed under the Middle School track bond issues.

1 Qg 5

Fowler-cross

2 "Dr. Lynch also showed me a copy of a letter
3 from the Architects Collaborative to Attorney Carter which
4 demonstrates that the actual dollar cost under the pro-
5 posed contracts to be signed today will amount to \$107,000
6 and not \$95,000 for the track.

7 "As you know, the Board by-laws place the School
8 District seal in the custody of the School District Clerk.

9 "I have not been present nor have I received the
10 minutes of any meetings of the School Board whereby
11 official or executive action authorization has been given
12 by Board resolution for entering into any contract or
13 contracts for dollar amounts exceeding \$95,000 for a track.

14 I am sure you have probably consulted with other
15 Board members and received their informal approval of
16 this. I personally cannot possibly see how this transac-
17 tion can be consistent with either the bond issue vote of
18 this District (which mandated a maximum cost for a track
19 of \$95,000) or the New York State Education law.

20 "However, it is not my position to question what
21 must, I am sure, be consistent with the advice of our
22 legal counsel.

23 "My purpose in writing this letter is to estab-
24 lish my concern in releasing the School District seal for
25 official purposes which have not, to the best of my knowledge

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Fowler-cross

2 been sanctioned by resolution of the Board of Education."

3 Signed by me, Clerk of the Board, copies sent to
4 Charles Richter, Superintendent of Schools and Henry Russell,
5 Vice President of the Board.

6 THE COURT: What is the date of the letter?

7 THE WITNESS: March 17, 1964.

8 Q Doctor, did you subsequently deliver the seal to
9 Mr. Carter?

10 A It was delivered by messenger in my behalf.

11 THE COURT: What is the purpose of all this?

12 MR. TRAGER: I will establish that in a moment,
13 your Honor.

14 Q The letter you wrote was affixed to the seal
15 in such a way that the seal could not be used without
16 having the letter come to the attention of Mr. Carter, is
17 that correct?

18 A Mr. Van Allsberg.

19 Q And Mr. Carter?

20 A I don't know about Mr. Carter. Yes, that is cor-
21 rect.

22 Q You wanted to make certain that these facts came
23 to their attention, is that correct?

24 A That is correct.

25 Q Did you subsequently hear from Dr. Russell that

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Fowler-cross

2 day who was a member of the Board?

3 A I did.

4 Q Did he advice you that he had no knowledge of
5 the facts as indicated in your letter? He was not aware
6 of it, in effect?

7 A Yes, he was not aware of it.
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Q And did you receive a call from, I believe, Dr. Lynch in effect castigating you for writing that letter and also releasing the letter of March 10, from the architect?

A The essence of Dr. Lynch's communication was simply that Dr. Van Allsberg had called him and asked him to see that the copies of the March 10 letter to which you referred were removed from the files in the School District.

THE COURT: Mr. Trager, you are taking an awful long time and I am getting impatient for your reasons to go into this. I would like to know why.

MR. TRAGER: It will come out right now.

THE COURT: I won't let you go much longer.

Q On page 6 of your memorandum you were ordered to destroy every copy of that letter, were you not?

A Dr. Lynch apparently was ordered to destroy the copies.

Q That correspondence that was referred to in that memorandum, was that sent to Aetna?

A Let me be sure I understand the question. All of the attachments to this memorandum, were they sent to Aetna?

Q Was the letter of 10 March and your letter of March 17?

A I did not send them to Aetna.

Q Did anybody from the Board notify Aetna of these facts?

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2 A Not to my knowledge.

3 Q Would not you state that the facts of the March 10
4 letter and the 17th were concealed deliberately?

5 MR. YAVNER: Objection, your Honor.

6 THE COURT: Objection overruled.

7 A Did you say would I say?

8 Q Yes, would you say the facts, these underlying facts
9 in the contents of your letter deliberately concealed?

10 THE COURT: From Aetna?

11 A I don't think anyone gave any consideration to re-
12 vealing them to Aetna.

13 Q They were kept from Board members. Dr. Russell until
14 you wrote him had no knowledge of it.

15 A My communication was kept from Board members but the
16 essence of the March letter was revealed. I believe the minutes
17 of that meeting are revealed here.

18 Q Did you subsequently have any occasion, as Clerk of
19 the Board, to notify Aetna of these facts underlying this, that
20 was March 17, the date of execution of the contract, of the
21 underlying facts surrounding the execution of the agreement and
22 the change order?

23 A No.

24 Q As Clerk of the Board and keeper of their official
25 minutes and/or correspondence, do you know of any correspondence

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Fowler - cross

457

that went to the Board or from the Board to Aetna informing them of the circumstances surrounding the exclusion and the bidding of this contract?

A Only to the extent which the change order was attached to the contract of Fabrizio.

Q With no amounts, just the change order, is that correct?

Were there any amounts attached to the change order? Any monetary amounts, that is?

A I believe it was the cash allowance in connection with alternate 3.

Q But there was no monetary amount attached to the change order which deleted work, is that correct?

A In the copy you have given me, the page relating to that is missing. There is an exhibit in already that has a change order attached to the contract. It is the first exhibit or second exhibit.

The only dollar amounts to the change on alternate 3.

Q Did you send the agreement with the change order to Aetna? That is, as Clerk of the Board?

A No, I did not.

Q And despite the execution of this change order, the contract price remained the same, did it not?

A That is what the change order says.

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Fowler - cross

458

THE COURT: Is this the original change order?

MR. TRAGER: It is the original change order.

THE COURT: The letter in March, did that refer to a change order and added costs? Was that after Fabrizio was on the job?

MR. TRAGER: The letter in March, March 10, was a letter from the architect to the Board indicating the deletion of work valued at 171,000, assigning values to the deletion. The deletion was executed without a dollar amount and this is the facts which led to the underlying illegality of the agreement in which the contract was declared illegal.

THE COURT: I understand that. I am a little confused about the difference between \$95,000 and \$100,000.

THE WITNESS: The two issues are involved here. One is the track and the track is separate and apart from the construction of the school. The 95,000 refers to what the community approved in building a track.

THE COURT: None of these items about signing the contract in the way it was signed and the exclusion of the change orders, none of these matters were made known by the School Board?

THE WITNESS: That is correct. At any time up until the trial of Judge MacLean.

THE COURT: Until it all came out in litigation.

646a

jge 5

Fowler - cross

459

THE WITNESS: Yes.

Q Are you familiar with that document, Dr. Fowler?

A I am.

(Defendants' Exhibit C received in evidence.)

Q Dr. Fowler, Exhibit C refers to a memorandum from you to Mr. Yavner with respect to advice you sought from Mr. Brind or Brind who was general counsel to the Department of Education for the State of New York, is that correct?

A Dr. Brind, yes.

Q What was the nature of that inquiry that you made to Mr. Brind?

A The date of this is March 8, 1966.

I explained to Dr. Brind our circumstances with Fabrizio leaving the job and asked him under those circumstances what our requirements were under the competitive bidding statute with respect to letting contracts for the completion of the construction work.

Q In that memorandum you placed in the categories the various alternatives available to you based on available facts. I am not interested in your going into all of them but merely to state with respect to the advice or the nature of your answer with respect to entering into contracts with certain subcontractors, did you not indicate that if you did that you would be bound by the bidding law?

1 A There are two related to that. The provisions are so
2
3 close I am not sure I can make the distinction.

4 Q I will put it this way: You directly entered into
5 contracts, as your previous testimony indicated, with Daniel
6 F. MacNamee and with Bradhurst site construction, is that cor-
7 rect?

8 A That is correct.

9 Q Were those contracts entered into pursuant to public
10 bidding?

11 A No.

12 Q I think your testimony indicated that they exceeded
13 the dollar sum of \$2500, is that correct?

14 A That is correct.

15 Q The completion of the Fabrizio contract was done as
16 a combination, was it not, part of it the general construction
17 was Mars Normel contract?

18 A Correct.

19 Q And included in the Mars Normel contract was several
20 other subs built into that maximum price, is that correct?

21 A That is correct.

22 Q And directly the Board entered into these separate
23 contracts with MacNamee and Bradhurst site?

24 A Yes, who were also subcontractors of Fabrizio.

25 Q And that incidentally appears on the damage schedule

1 jge 7
2 in your supplemental or your answers to supplemental interroga-
3 tories. You are seeking, I think, the aggregate amount of
4 131,000 for MaxNamee. I think you have the document there.
5 MacNamee is how much on that schedule?

6 A 102,000.

7 Q And Bradhurst Site is 29?

8 A Yes.

9 THE COURT: And they aggregate 131,000, is that cor-
10 rect?

11 A We are not seeking that. That is to say it is part
12 of our completion cost.

13 Q It is part of your completion cost for which you are
14 seeking damages?

15 A For the difference, yes.

Q The difference in what? You are asking for the 131,000, not a difference?

A We are asking for the difference between the Fabrizio and Martin contract plus change orders and our total cost of completion, a part of which is based upon the cost of MacNamee's contract and Bradhurst's.

Q And those costs are 131,000?

A That's correct.

Q Doctor, you previously referred to, I believe, the completion resolution fixing completion.

A Yes.

Q The Board passed a resolution on February 8, 1967 accepting this job as of November 9, 1966, is that correct?

A Yes, that's correct, with respect to Mars Normel.

Q Would this be correct in stating that Mars Normel completed all the work for the Middle School that embraced the work called for under the Fabrizio contract?

Is that correct?

It was completion of that work called for under that contract and any authorized additions and extras?

A Yes. But you had MacNamee and Bradhurst also doing Fabrizio and Martin work. I am not sure that their date of final completion might not have been after Mars, Normel.

Q Would you know that for a fact?

1 A I recall that there was some problem with MacNamee
2 and the architect did not serve final completion of MacNamee
3 until the Spring of 1967.

4 In fact, one of his payments may have been in 1968.

5 Q Where could you determine that? Is that on the last
6 requisition?

7 A Wait. I have some notes in front of me that would
8 tell me.

9 Our last payment to MacNamee on the parking and
10 curbing contract was in September of 1968 in an amount of
11 \$1200.

12 Q When the Board adopts a resolution, it did so
13 pursuant to the contract requiring that 45 days elapse between
14 the date of acceptance and approval prior to issuance of final
15 payment, is that correct?

16 A Yes, that's correct.

17 Q And that provision was in the Fabrizio and Martin
18 contract, too, was it not?

19 A I don't know if it was the same provision or not.

20 Q Would your notes indicate when you last made a pay-
21 ment to Fabrizio and Martin?

22 A Yes.

23 The last two payments listed under his account is
24 February 23, 1966 to Fabrizio and March 19, 1966 to the Sheriff
25

1 gte 3

2 for an attachment.

3 Q That is 1966.

4 A Yes.

5 Q Up through and including the final payment you made
6 to MacNamee, did you make any payments to the Aetna Casualty
7 and Surety Company under this contract? Were any payments
8 made that you have knowledge of?

9 A Directly by the Board of Education?

10 Q By the Board to Aetna Casualty and Surety?

11 A Not to my knowledge.

12 Q Referring to Exhibit C with respect to the advice
13 you received from Dr. Brind regarding the categories involved
14 in the handling of the completion contract, does the entering
15 into those contracts with MacNamee and Bradhurst fall into any
16 one of the categories that you outlined there in that memo?

17 A It would seem to me that it falls within category C.

18 Q Did the School District assume the work of the con-
19 tractor itself, the general contractor, Fabrizio and Martin?

20 A With respect to the work of MacNamee and Bradhurst?

21 Q They were subs of Fabrizio and Martin, were they not?

22 A That's what this says.

23 Q But the School Board entered into a contract with
24 Mars Normel for general construction, is that not correct?

25 A Yes, but Mars Normel had no responsibility for the

work of MacNamee and Bradhurst. We entered into contracts directly with Fabrizio and Martin's subcontractors.

Q You excluded it from their contract, is that not correct?

A That's correct.

Q But you included all the other subs?

A Many of the subs, not all of them.

Q Were there any there working that weren't included in your contract?

A No, no.

Q Then with the exception of MacNamee and Bradhurst, they were all included? Anybody that had to finish work called for on the school either was under a direct contract with Mars Normel that took over or they came in the category of Bradhurst and MacNamee, whom you entered into a contract with?

A No, that's not quite true. There were some subcontractors of Fabrizio and Martin who had work to complete who were not employed under three party agreements with the Board and Mars Normel.

Q How did you handle them?

A Their work was done by Mars Normel.

I think the examples that Mr. Powers cited earlier today would be examples of that.

Q Then they were embraced under the Mars Normel contract,

1 is that correct?

2 Mars Normel took them over?

3 A No, he did not take them over, he hired his own sub-
4 contractors.

5 Q And just the--

6 A That was part of his cost. That was part of his con-
7 tract.

8 Q Yes. But I asked you of those contractors that per-
9 formed work on the site. Then those contractors didn't per-
10 form any work, did they?

11 A After the default?

12 Q Their work was taken off by somebody else?

13 A Off the default of Fabrizio and Martin?

14 I understood your question to be were there people
15 employed by Fabrizio and Martin as subcontractors who did not
16 work after Fabrizio default and the answer is yes.

17 Q Can you recall how many contractors responded to the
18 bids for the completion?

19 A It is my recollection there were three who submitted
20 bids.

21 Q And with the exception of Mars Normell, all of the
22 other bidders, the remaining two, were ruled unresponsive, is
23 that correct?

24 A Counsel advised that their bids were informal in that
25

gte 6

Fowler - cross

467

they did not meet the requirements of the bidding documents.

They did not submit a bid that was responsible to the requirements.

Q Who was counsel?

A Lewis Yavner.

Q Did Mr. Yavner also represent Mars, Normel?

A In their bid for work in the School District?

Q I don't know. Did he represent them?

A It is my understand he has represented the firm on other occasions, yes.

MR. TRAGER: That's all I have.

THE COURT: All right. Is there anything further for this witness?

You are concluded, Mr. Trager?

MR. TRAGER: I concluded, your Honor.

THE COURT: All right.

MR. YAVNER: Your Honor, I have a volume of stuff to go over with Mr. Fowler on redirect. May we adjourn until tomorrow morning?

We have several more witnesses. We can not--I have a couple of hours.

THE COURT: When is Mr. Fowler going to go?

MR. YAVNER: Mr. Fowler has no problem about tomorrow, tonight was the problem. Once having stayed--

gte 7

Fowler - cross

467a

THE COURT: I think I want you to start and go with him for 15 minutes in any event. We will go until 6 o'clock. Start with your examination.

If you have any redirect you can start. We will go at 6 and we will resume tomorrow morning at 9:30.

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7b gtg 1

Fowler-redirect

2 REDIRECT EXAMINATION

3 BY MR. YAVNER:

4 Q Mr. Fowler, taking Mr. Trager's last question
5 about who was counsel and your answer that Mr. Yavner was
6 counsel and that I represented Mars-Normal, is the docu-
7 ment which Mr. Trager gave you last that was introduced
8 inevidence refer to a report of mine to the Board of Edu-
9 cation about representing Mars-Normel or is that a differ-
10 ent document?

11 A No.

12 Q Do you know where the document is, that report?
13 Is that in evidence, if you recall?

14 A No, it is not in evidence.

15 Q Do you know where that report is?

16 MR. POWERS: Your Honor, I think Mr. Yavner should
17 know what reports he is talking about and not be relying
18 on the witness. He is doing the examination, not Dr.
19 Fowler.

20 MR.YAVNER: It will take me several minutes to
21 find it. I want to go to that report.

22 Q Dr. Fowler, do you know of a report in which I
23 referred to the Board of Education in which I tell the
24 Board of Education before there is a bid from Mars-Normel
25 that I have represented this potential bidder?

657a

469

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gtg 2

Fowler-redirect

A Yes.

Q Do you know if that report is here among your records?

A Yes. There are at least two items that refer to this. One is a report from you to the Board of Education in which you bring to their attention the fact that you have been associated with that firm as counsel and that should problems arise, were they to be the successful bidder and we were to enter into an agreement with them, that you would represent neither side.

I am also aware of a letter which you sent to the Board of Education and to Mars-Normel following the execution of the agreements with Mars and between Mars and the Board stating substantially the same, that should any problem arise you will disqualify yourself from representing either party.

THE COURT: Mr. Yavner, I don't believe that Mr. Trager was raising the question in terms of any impropriety on your part; he was raising it as impropriety of the Board, going into the agreement. That is what you have to meet.

All right, let us move on.

MR. YAVNER: Unless I misunderstood you before, for how long did you intend to continue tonight?

658a

470

gtg 3

Fowler-redirect

THE COURT: Mr. Yavner, continue to ask this man some questions if you want to and then we will adjourn at some point. I will adjourn the court.

Q A question was put to you whether the Board of Education, to your knowledge, had made any payments directly to Aetna and your answer was not to your knowledge.

To your knowledge, did the Board of Education pay premiums for performance bond in connection with a requisition of Fabrizio?

A Yes.

Q Do you recall in what amount that was?

A No, but that would be on the first requisition of Fabrizio & Martin. I believe there were two premiums, one for performance and one for labor and material bonds.

Q Dr. Fowler, did the Board of Education, during the period October-November-December 1964 receive reports from the architect about the nature of the work of the contractor?

A Yes.

Q What was the general tenor of those reports?

A That the work had not been progressing --

MR. POWERS: Objection, your Honor, unless Dr. Fowler knows of his own personal knowledge.

Q Did you receive those reports, Dr. Fowler?

1 gtg 4

Fowler-redirect

2 A I have -

3 THE COURT: It seems to me that if the reports
4 were made by the architect, why don't you have the archi-
5 tect testify about it? Ask the architect about what the
6 reports mean. Why have this man tell us what the architect
7 said?

8 If you have the architect here, let him tell us
9 about the report and you won't have that problem.

10 Dr. Fowler said he made reports. If the architect
11 made reports complaining in the reports, you have the
12 architect and have him here.

13 MR. YAVNER: These are written reports, your
14 Honor.

15 THE COURT: Then get them.

16 Q Dr. Fowler, will you please produce these re-
17 ports?

18 A They are in the architect's notebook over there.

19 THE COURT: On second thought, I think that if
20 you are going to have them like that, you have an archi-
21 tect here. You have the architect come in here and tes-
22 tify about it and we can have it done much faster.

23 Let us proceed on with some other inquiry.

24 You have an architect here, he made the reports,
25 he knows what he did.

1 gtg 5

Fowler-redirect

2 MR.YAVNER: Your Honor, I ran into a problem
3 when he was here and this afternoon I had Mr. Harkness
4 here, who was the principal. Mr. Crane did not come.
5 Mr. Crane testified that he was head of the supervision
6 division of TAC and was up there in Boston until about July
7 of 1965, at which time he came down to personally supervise
8 the job.

9 He testified further that he had been familiar
10 with all the reports and everything that happened.

11 Nevertheless, objection was made, which you sus-
12 tained, your Honor, to his referring to the reports and
13 events that occurred before he came on the job.

14 Mr. Harkness was here today. He was the gentle-
15 man who was here with the surgical collar around his neck.

16 In view of the time that he would not be able to
17 be reached, he had to leave and go back to Boston be-
18 cause of his medical condition, so that unless I am able
19 to refer to these documents during the period September
20 of 1964 to July of 1965 through Mr. Crane, the only other
21 person to whom I can refer to it is the representative
22 of the Board who received these documents.

23 MR. POWERS: If I may, your Honor, it is my
24 recollection that you did not object to reports being re-
25 ceived, I think the objection was with respect to

1 gtg 6 Fowler-redirect
2 requisitions.

3 I may be in error.

4 THE COURT: I don't remember now.

5 MR. YAVNER: Your Honor, may I repeat my applica-
6 tion that we adjourn for the day and resume in the morning?

7 THE COURT: Mr. Yavner, you are at all times in
8 terms of this case seeking an application to adjourn.

9 MR. YAVNER: Yes, sir.

10 THE COURT: I'm sorry, the point is that this case
11 has to be finished. I told you that and I was asking some
12 cooperation from you.

13 The problem with the case is, let's get this case
14 going. If we stop dealing with a lot of irrelevancies,
15 we probably can get this case finished.

16 MR. YAVNER: I am sure we can. I just have a prob-
17 lem.

18 THE COURT: All right. We will adjourn until
19 9:30 tomorrow morning.

20 MR. YAVNER: Thank you, your Honor.

21 (Adjourned to 9:30 a.m., Tuesday, March 6,
22 1973.)

WITNESS INDEX

<u>Name</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Charles W. Fowler(resumed) (recalled)		292 415	468	
Anthony C. Sabella	394	408		

EXHIBIT INDEX

<u>Plaintiff</u>	<u>Identification</u>	<u>In Evidence</u>
13		293
14		294
15		330
16		341
17		348
18		361
19		363
20		368
21		371
22,23		379
24		405
25		428
26		437
27		438
28,29		439
30,31		442

EXHIBIT INDEXDefendantIdentificationIn
Evidence

9

405

Defendant Aetna

A

449

B

451

C

459

1 Qg 1

2 Fabrizio & Martin, Inc.

3 v.

66 Civ. 2935

4 The Board of Education Central
5 School District No. 2, et al.

6
7
8 March 6, 1973
9 9:30 a.m.

10
11 (Trial resumed.)

12
13 THE COURT: Good morning, gentlemen.

14 ...

15 C H A R L E S W. F O W L E R, resumed:

16 THE COURT: I have a sentencing and the defendant
17 is about 15 minutes late, but when she arrives, I will
18 have to interrupt.

19 REDIRECT EXAMINATION (continued)

20 BY MR. YAVNER:

21 Q Dr. Fowler, on the basis of Mr. Powers' cross-
22 examination yesterday, have you prepared a revised schedule
23 of completion costs that followed Fabrizio's leaving the
24 job?

25 A I have.

665a

Qg 2

Fowler-redirect

Q Please set forth the items that you now include.

A Based on my conversation with Mr. Powers' yesterday and what I understand is involved here, I have prepared a first sheet which is entitled Analysis of Completion Costs for General Construction and Site Work following the Default of Fabrizio & Martin.

The first item which I use in this analysis is the Fabrizio & Martin general construction and site work contract as of the 1st of March 1966 when he left the job.

I have included in that the change orders numbered 15 and 16 which were apparently approved by the architect but had not as yet been approved by the Board of Education but nevertheless I have included those in that contract amount.

That amount is \$2,641,697.

I believe you will also find that amount listed on requisition 22, the requisition that was not paid.

That then represented, as of the 1st of March when Fabrizio left the work, what his total contract including all approved change orders was.

The second item which I then listed --

THE COURT: If that dollar figure included the total amount of construction costs that had been approved prior to Fabrizio's leaving?

Og 3

Fowler-redirect

THE WITNESS: That's right.

THE COURT: And the two change of order items were included in this amount, when they left the job the total construction cost at that point \$2 million, six.

Then it had been agreed at least up to that point that the building could be completed or would be completed and all the work done at that cost?

THE WITNESS: That is right; another way of saying it is if he had continued until March 1 and nothing else happened, his total contract would have been two million, six.

The second item I listed were those payments that we made for general construction and site work and the attendant costs in re-letting the contract. I will enumerate those.

Payments to Fabrizio & Martin, \$2,126,756.

Loss on Fabrizio & Martin retainnage bonds,
\$5,103.

Payments to Mars-Normel for general construction and site work, \$428,164.

Payments to MacNamee & Company for general construction and site work, \$102,017.

Payments to Bradhurst Site Development Company --

THE COURT: I can't follow that. That was a payment

1 Qg 4

Fowler-redirect

2 to whom?

3 THE WITNESS: MacNamee, that is \$102,000.

4 Payments to Bradhurst for general construction
5 and site work, \$29,329.

6 Payments to Fabrizio subcontractors and other
7 disbursements made in the course of re-letting the con-
8 tract, \$85,051.

9 Increased project costs for clerk of the works
10 and insurance after March 1, 1966, \$9,349.

11 Q On those two items you broke them down as had
12 been discussed in yesterday's testimony?

13 A This was dealt with in yesterday's testimony.
14 The clerk of the works was half of the \$15,096. or \$7549.

15 The insurance was six months, from March to
16 November, \$1800.

17 That totals \$9,349.

18 The last item then was increase in the architect's
19 basic fee due to the increase in construction after March
20 1, 1966, \$21,358.

21 I have a back-up to that but perhaps I should
22 finish the first page here. That would make then a total
23 of amounts, all payments related to the general construction
24 and site-work and completion costs of \$2,807,127.

25 Comparing that latter figure with the first figure,

1 Qg 5

2 Fowler-redirect

3 what it would have cost if nothing else had happened after
4 March 1 and Fabrizio had completed, I get an increased
5 completion cost of \$165,430.

6 With respect to the architect figure, the way I
7 figured that based on what I understood Judge Carter to
8 be saying, I took first the Fabrizio and Martin completed
9 construction certified by the architect through the 1st of
10 March which is \$2,429,476.

11 Again, this is a figure that appears on requisition
12 22 which was certified but not paid. But the architect
13 had certified that Fabrizio had completed \$2,429,476
14 worth of work.

15 The next item then is the cost of general construction
16 of Mars-Normel, \$428,164.

17 The cost of general construction for MacNamee
18 of \$102,017 and the cost of general construction of
19 Bradhurst, \$29,329.

20 If you add all of those construction costs together
21 you come to a total of \$2,988,986.

22 From that I subtracted that same figure of
23 Fabrizio's contract including all change orders as of
24 March 1st. That figure again, \$2,641,697. It should
25 be the same as the first figure I gave.

THE COURT: All right.

1 Qg 6

Fowler-redirect

2 THE WITNESS: If I subtract the difference be-
3 tween those two, that is, the difference between the ac-
4 tual construction work totally that had been certified
5 and the construction work certified as of the 1st of March
6 and I get a difference of \$347,289, against which I apply
7 the basic fee rate of the architect of 6.15 per cent,
8 giving then the added basic fee for work beyond the first
9 of March at \$21,358.

10 MR. POWERS: It may be out of order at this
11 juncture and if it is I wish the Court would advise me,
12 but as I understand the formula used by Dr. Fowler in
13 arriving at the architect's fee is not in accordance with
14 your Honor's ruling.

15 As I understand it, your Honor's ruling was
16 that the \$2,641,000, which was the lump of Fabrizio's &
17 Martin's contract plus extras was not to be taken into
18 consideration in determining the architect's fee subse-
19 quent to March of 1966.

20 It was only those extra costs that were involved,
21 extras that were given to Mars-Normel or Bradhurst or
22 MacNamee that were to be taken into consideration plus
23 that \$5,007 or whatever it was.

24 THE COURT: I thought that Dr. Fowler had followed
25 my formula when he started using the figure \$2,429,000

Qg 7

Fowler - redirect

of work completed.

But what he has done is to add the work completed and add to that the cost, the general cost added to what you had done plus what had to be done thereafter and he subtracted from that total figure the \$2,600,000 which was the figure that I thought had to be the basic figure since the architects were getting a basic percentage of that and the Board had approved that and therefore it seemed to me you should not be penalized, if there was any penalty, over and above that amount.

I think he has arrived at the figure.

On cross-examination you may seek to show that he has not followed it but I am satisfied.

I thought he had not because I didn't understand when he first used that \$2,600,000 figure where we were going but I do now.

THE WITNESS: My understanding from what has happened in these four days is that the essential damages we are speaking about are reduced to our cost of completing which I have dealt with and then the question of the interest costs.

671a

jge 1

Fowler - redirect

482

THE COURT: The \$3,447,000 is the figure that is the base figure from which you get the percentage. What is that percentage? The architect's aren't getting \$347,000, they are getting a certain percentage of that.

THE WITNESS: Yes. I applied 6.15 per cent. That's then the 21,358 that is listed in the first figure.

MR. YAVNER: This is really a footnote.

THE WITNESS: My figures for added cost were 156,430. With respect to the interest cost, as I understand what your Honor was saying yesterday, the only applicable interest costs would be that part of the \$250,000 necessitated by the increased construction costs.

THE COURT: If any.

THE WITNESS: Yes, if any.

I think as I reviewed the testimony with either Mr. Trager or Mr. Powers yesterday, at the time we issued the bond anticipation notes there were two apparent needs.

We had just signed the completion contracts with Mars and Bradhurst and MacNamee and they had totalled, as I recall the memorandum, \$11,000 more than we had in cash to pay. We had obligated ourselves to \$111,000 more in completion costs. The Board decided to issue the \$250,000 in additional funds based on that \$11,000 as well as 136,000 that they had used out of the furniture and equipment account for prior change orders.

672a

jge 2

Fowler - redirect

483

That comes to within \$3,000 of the \$250,000. When it is all said and done and the work was finished rather than 111,000 our actual completion costs were 165,430, because I believe the \$111,000 figure did not take into consideration architect's increased fees, there were certain change orders which were written subsequent to the Mars, Normel contract and those have been reviewed.

So I have, for the purpose of interest costs, then said that \$165,000 being our increased cost of completion is 66 per cent of the \$250,000 figure.

Applying that against the interest costs that were listed in Defendants' Exhibit 95 it would appear the applicable interest costs or the interest costs applicable to this \$165,000 increase general construction and site work cost figure is \$115,366, 66 per cent of the total interest cost.

So my summary is that our completion costs were 156,430, the attendant interest costs to finish that complex, added completion cost, 115,366.

THE COURT: A total of \$279,796 which is the total--

THE WITNESS: 280,000.

THE COURT: That is right.

How does that compare to your original cost?

MR. YAVNER: About half a million dollars less.

Originally we asked for \$750,000 in damages.

673a

jge 3

Fowler - redirect

484

THE COURT: All right.

This is then damages for the increased costs plus the fact of course that you are claiming you want a return of the \$2,126,000.

MR. YAVNER: As to that, your Honor, I think we all recognize Judge Ryan's opinion which made it clear, it would be wholly inequitable if that entire sum were to be demanded and given to the Board. I have been trying to think of a measure of damages that might be applied to that. The only one that I have thought of that seems reasonable is to take into account the very illegality itself of that contract and what it did. What it did was to drive--

THE COURT: If that is going to be argued, why don't we continue on with the evidence and get that finished. If you can give me the formulation simply I would like to hear it but I don't think it is appropriate to interrupt the examination of the witness for argument.

MR. YAVNER: All right.

At this point I would like to offer in evidence the memorandum that Dr. Fowler has prepared and just described.

MR. POWERS: I have no objection, your Honor.

(Defendants' Exhibit 99 received in evidence.)

THE COURT: I gather that it is also clear, Mr. Yavner and Dr. Fowler, that these figures, I suppose the plaintiff's

674a

jge 4

Fowler - redirect

485

and the additional defendant still are going to contend and seek to show, as they had yesterday, that in that 428,000 plus 102,000 and 29,000 in costs, and I suppose even the 85 to the subcontractor as to whether or not those items included things other than completing what Fabrizio had undertaken to do. I suppose that they can show that any of these items are over and above what Fabrizio undertook to do and we might end up further with production.

MR. POWERS: That is definitely correct, and also in addition to that the plaintiff questions this method as being determinative of measure of damages.

THE COURT: You will have an opportunity to query Dr. Fowler about that.

MR. YAVNER: If your Honor please, I have here a group of documents or the back up documents for Exhibits 85 in identification which consisted of the Mars certifications requisitions and the like. These are now the records from the School District and as a matter of convenience I would like to show the entire group at one time to Dr. Fowler.

Each one of these is marked replacing 85A and so forth, but it is probably more convenient to get the new numbers at this stage.

Let me show them to Dr. Fowler.

I showed these to Mr. Trager the other morning.

jge 5

Fowler - redirect

486

MR. POWERS: I have not seen them. I know generally what they contain.

THE COURT: Show them to Dr. Fowler and let him identify them. They are what you asked for apparently?

MR. POWERS: Not accurately, your Honor. I also object to this testimony coming through Dr. Fowler because on his direct and also his cross examination he indicated his complete unfamiliarity with the information contained in these documents.

MR. YAVNER: These documents had not been in before.

MR. POWERS: There is just a reproduction of the other documents with the back up material.

THE COURT: I think, as I remember the testimony, I think Dr. Fowler said that in terms of the back up material as to whether that was correct and verified, he didn't have anything to do with that. The architect had to do that and that is what Mr. Powers is complaining about. You are introducing back up material through Dr. Fowler and Dr. Fowler isn't the person because he doesn't know and in the cross examination of the items he wouldn't be in a position to know about it.

MR. YAVNER: The problem the other day was that Mr. Crane, who is now in the courtroom, had been the one who produced the original set of exhibit 85. He did not have the back up material with him. These are now the documents from

jge 6

Fowler - redirect

486a

the Board's records and I would suggest that Dr. Fowler put them in with this understanding. All he is doing is showing that these come from the Board's records and Mr. Crane can be cross examined on the back up material.

THE COURT: Very good.

end lb

gte 1

Fowler - redirect

487

Q I have them, please.

A These are the--

MR. POWERS: If I may, your Honor, there is just one thing I would like to point out.

I examined Dr. Fowler in an examination before trial, I examined Mr. Crane in an examination before trial.

Both of them were asked--and I will show this by depositions--both of them were asked for this information; both of them denied having it during the course of the examination. That's why I have never seen them. I did not have any back up material and they both told me the other one had it.

THE COURT: Gentlemen, the thing we are going to do now is very simple:

Dr. Fowler is going to be asked to identify these documents as coming from the Board records; the documents will then be marked for identification; they will then be turned over to you, Mr. Powers and Mr. Trager, to study and when Mr. Crane gets back on the witness stand you will be in a position to make an inquiry with respect to them.

MR. POWERS: Thank you, your Honor.

A These are requisitions with supporting material together with architect's certificate and a copy of the school district check to Mars Associates and Normel Construction Corporation on their requisitions numbers 1 through 6, taken

gte 2

Fowler - redirect

488

from the official records of the Board of Education.

MR. YAVNER: Your Honor, I offer these in evidence.

THE COURT: They can't be offered in evidence now because they haven't been verified. They are just Board records.

Have them marked for identification and then give them to Mr. Powers. Whether they will be admitted or not will be determined at the time Mr. Crane gets back on the witness stand.

MR. YAVNER: Then, your Honor, my understanding is we are simply marking them for identification now and putting them aside until Mr. Crane is on?

THE COURT: Right. You are going to give them to Mr. Powers and Mr. Trager so they can study them and hopefully we can make some progress in that regard.

There is no need for you to wait for that. You are not going to ask any more questions on it. Let the Clerk mark them and continue your examination of Dr. Fowler.

MR. YAVNER: I have here a similar group of back up material and documents for the MacNamee and Bradhurst Exhibits for identification before, and if we may follow exactly the same procedure.

THE COURT: All right.

Q Dr. Fowler, will you describe these for the record

gte 3

Fowler - redirect

489

and we will have them marked?

A These are four requisitions and claim forms with supporting material and copies of the School District check to Daniel F. MacNamee and Company on the cost plus work for the Bedford Middle School.

Q Excuse me, I think we should stop as a group then continue with the other subject.

This is one subject, is it not?

A One contract.

Q And the next group?

A These are three claim forms and supporting material together with a copy of the School District check to Daniel F. MacNamee and Company for extra work.

These are eight requisitions and claim forms with supporting materials and a copy of the School District check, together with architect's certification for Bradhurst Site Construction Corporation taken from official School District records.

Q While we are waiting for these to be marked, if I may continue.

Dr. Fowler, I show you Exhibit 24 marked for identification.

Would you describe what that is, please?

A Exhibit 24 is a letter from John C. Harkness, Archi-

gte 4

Fowler - redirect

490

1 tect, dated November 30, 1964 to Dr. Duane Alhf, Superintendent
2 of Schools responding to a letter of Dr. Alhf's, dated
3 November 24 in which Dr. Alhf inquired of Mr. Harkness as to
4 what efforts the architect was making in trying to get the
5 general contractor, Fabrizio and Martin, to live up to the
6 conditions of the specifications and to prevent further delays
7 on the job.
8

9 Q Dr. Fowler, do you identify this document as one
10 ta-en from the official school records under your supervision
11 and control?

12 A I do.

13 MR. YAVNER: I offer this in evidence.

14 MR. POWERS: I will object to this, your Honor. It
15 has to do with delays and delays are out of the questions, as
16 I understand it.

17 THE COURT: You can't have it both ways, Mr. Powers.

18 MR. POWERS: I don't understand, your Honor, because--

19 THE COURT: Yesterday you were allowed to introduce
20 evidence, over Mr. Yavner's strenuous objection, showing how the
21 School Board had prevented or not paid on time, held the money
22 up of Fabrizio and so forth, and the reason I let it in was
23 because of the equities of the situation as justification for
24 your leaving the job.

25 Mr. Yavner is now countering by attempting to introduce

evidence to show a course of conduct by you which was apparently consistent with your walking off the job.

You can't really have it both ways. He has a right to counter whatever equities or conversations you put in if I am going to consider the equities in the case.

He is trying to show that your client was a bad actor from the beginning, that's all.

MR. POWERS: Your Honor, I know I was putting in evidence on delays originally and I think I put in two exhibits until I got the--

THE COURT: It was not delays. You weren't putting it in on delays, you were putting it in and I allowed it because I thought it was appropriate to put it in to show a course of conduct to justify your going off the job and, therefore, is something in mitigation.

MR. POWERS: Failure to make payments.

THE COURT: What he is attempting to do is to show that there was no real justification for that, that without the delays you were consistently late and were not performing your work in the course of the contract but in a non-professional manner.

Is that is your obligation--

MR. POWERS: I will waive my objection subject to cross examination now, because obviously Dr. Fowler has

gte 6

Fowler - redirect

492

knowledge of the facts.

THE COURT: All right.

Mr. Trager, let us move on with this. Are you going to object to it?

MR. TRAGER: No.

THE COURT: All right, let it in.

MR. YAVNER: I offer this in evidence, then.

THE COURT: It will be received.

(Defendants' Exhibit number 24 was received in evidence.)

2 Dr. Fowler, I show you Exhibit 23 for identification. Please describe that.

A Exhibit 25 is a letter from Joseph F. Shappa of the architectural firm, written to Dr. Howard Lynch on December 21, 1964 in which Mr. Schappa brings to the attention of the School Board the fact that Fabrizio and Martin has failed to properly compact fill in accordance with the specifications at Building B and he details that and then points out that the failure on the part of Fabrizio and Martin to properly compact this fill can only result in further delay to the concrete operations at this building.

MR. POWERS: Your Honor, I think this deals with delay, that's all it deals with, and according to what Dr. Fowler says it does deal with delay, period. That's all.

gte 7

Fowler - redirect

493

1 This is why I had a number of exhibits that I did not
2
3 introduce because of your Honor's ruling that delay was out of
4 the question and I specifically removed them and I think we
5 are getting right back into that situation again.

6 I strictly dealt with reasons for non-payments.

7 THE COURT: I know, but that does not only deal with
8 delays but your properly performing a particular work and it
9 seems to me if you are going to justify your walking out on the
10 grands that the Board didn't pay, then they certainly have a
11 right to show a course of conduct to the contrary.

12 I am going to permit it. I am not permitting delays.
13 This may deal with delays as well, but the thing that Dr.
14 Fowler read that struck my ear was that you had not properly
15 done--

gtg 1

Fowler-redirect

MR. YAVNER: Improperly of the work.

MR. POWERS: They paid us for all this work so obviously it was properly done.

MR. YAVNER: Actually, you corrected it.

THE COURT: They may have paid you for it, but they may have been unhappy about it in any event. In any event, I am allowing it.

(Defendant's Exhibit 25 received in evidence.)

THE COURT: All right, Mr. Yavner, just move on with the case.

Q I show you Exhibit 26 for identification.

Please give the same description.

A Exhibit 26 is a letter dated December 21, 1964 from Mr. Shappa to Dr. Lynch reporting that Fabrizio & Marti has failed to properly place and compact fill in accordance with the specifications in the interior of Building C. They indicate that this failure on their part has resulted in excessive settlement beneath the shores of the slab for the second floor.

MR. YAVNER: I offer this in evidence, your Honor.

THE COURT: All right. I think we don't have to overload the record with that if you can give me specific instances of matters like that.

1 2b gtg 2

Fowler-redirect

2 MR. YAVNER: Let me see if I can cull some out.

3 MR. POWERS: Objection, your Honor.

4 THE COURT: I know. I understand your objection.

5 (Defendant's Exhibit No. 26 received into evi-
6 dence.)

7 MR. YAVNER: I think I have to offer these, your
8 Honor.

9 THE COURT: Offer what you have to offer then.

10 Q 27 for identification, Dr. Fowler.

11 A 27 for identification is a copy of a letter dated
12 December 21, 1964, which was sent to the Board of Educa-
13 tion by the architect. The letter is a letter to Fabrizio
14 & Martin. It is a two-page letter detailing the problems
15 with the latest schedule for concrete work indicating that
16 Fabrizio & Martin is behind schedule and the improper work
17 that has been done recited in the prior letters and the
18 problem of settlement of fill.

19 THE COURT: If they are in the prior letters then
20 we don't need that letter.

21 What do we need that letter for? If you have
22 already introduced exhibits on the matter, what do you
23 need this for?

24 MR. YAVNER: The important thing was as a result
25 of what was described in the earlier letters, since that

2b gtg 3

Fowler-redirect

time there has been a problem of settlement of fill within the building. The fill had not been placed in accordance with the contract.

THE COURT: All this is cumulative.

MR. YAVNER: I will withdraw this one then, your Honor.

I have here as Exhibit 28 a letter of December 28, 1964.

It adds more detail to the previous ones, and if counsel will stipulate that we have these letters and a great deal of correspondence on this general subject then I can dispense with it. I just don't want the record to show that they came in with material and we just sat quietly.

MR. POWERS: That you what?

THE COURT: That they, meaning you, Mr. Powers, came in with material and that the defendant School Board sat by quietly.

MR. POWERS: Your Honor, I will admit for the record it occurs on any construction project; there are letters coming back and forth, one complaining to the other about this and that and other letters coming back complaining about something else. I admit this happened.

I agree that Mr. Yavner probably has 200 letters and I might have 200 letters saying the opposite.

2b gtg 4

Fowler-redirect

If we want to each put in our 200 letters, I can do that, too.

MR. YAVNER: If, in effect, this means that Mr. Powers, just as I have made some modification in our claim, if Mr. Powers is withdrawing this argument of his that the equities gave him the right, gave his contractor the right to walk off the job and that that should be taken into consideration as mitigation of damages caused, then I am perfectly willing to accept this concession.

THE COURT: I would be very surprised if Mr. Powers is going to agree to that, but he can speak for himself.

MR. POWERS: The equity is payment of money and failure to pay money. That has been what I have been swelling on, not delays or things like that.

These questions that Mr. Yavner --

THE COURT: I think what we have here is I am not going to hear any and I am not going to admit any more documents showing that there had been a failure to complete the fill, whatever that is, because you have already made that point.

If you have any documents that show, one, either in January that you were complaining about the work that was being done, not about its delay, but about its poor

688a

498

2bgtg 5

Fowler - redirect

quality and so forth, then that kind of documentation I will allow.

MR. YAVNER: I am going to do this, then.

I am going to skip to some of these letters and come to an end result of this early stage.

THE COURT: I am going to recess so that I can take a sentencing in another case and I will give you some time to go over that matter.

(Recess.)

MR. YAVNER: Your Honor, I have culled out some of these. Maybe as I go through them, I will be able to cull out some more, but I am able to confine this as much as I can.

THE COURT: All right.

BY MR. YAVNER:

Q I show you Exhibit 30 for identification.

Please describe that.

A It is a telegram received by the Board of Education January 12, 1965, informing the Board that a telegram had been sent to Fabrizio & Martin by the architect informing Fabrizio & Martin that the architect could not issue a certificate of payment for the month of December 1964 for the following reasons:

1: The firm failed to comply with Article 6,

2bgtg 6

Fowler-redirect

Section G-2 of the specifications requiring a set of blue line prints on the job, and secondly, under Article 26, general conditions, items B and E, the three other prime contractors are submitting claims resulting from your, that is, Fabrizio's, actions on the job."

MR. YAVNER: I offer this in evidence, your Honor.

MR. POWERS: Objection.

THE COURT: Are you objecting to that?

MR. POWERS: Yes, your Honor.

THE COURT: Actually, I am admitting it.

MR. POWERS: I really should not object, because it does deal with failure of payment, so I will withdraw my objection.

THE COURT: All right.

MR. POWERS: The reason for failure to make payment.

THE COURT: It seems to me actually that I was about to say that this is the only bit of evidence thus far introduced on redirect that is a direct refutation of the kind of evidence you were trying to introduce. It is clearly admissible.

(Defendant's Exhibit No. 30 received in evidence.)

MR. TRAGER: Your Honor, may I be heard a minute?

As far as the additional defendant Aetna, I object

1 2b gtg 6a

Fowler-redirect

2 to this whole line of introduction of evidence because I
3 don't feel that it goes to establish the underlying
4 equities between Aetna and the Board on any of this matter.
5

6 THE COURT: This has nothing to do with you, it
7 has to do with Fabrizio & Martin and the Board.

8 MR. TRAGER: Thank you, your Honor.
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Fowler-redirect

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3 THE COURT: On reflection, since you have not
4 produced that, I am going to narrow this kind of evidence
5 to any evidence that you can introduce which seeks to
6 explain and justify the delay in paying Fabrizio.

7 Q I show you Exhibit 34 for identification and call
8 your attention particularly to item 2 at page 3 of this
9 document.

10 Please describe it to the Judge, please.

11 A This is a letter dated January 26, 1965, con-
12 sisting of nine pages plus three pages of references sent
13 from the architect to the Board of Education certifying
14 to the Board that the owner has the following causes of
15 action against the contractor under Article 22.

16 Skipping over those items not pertinent, the
17 second item is a heading entitled "The firm of Fabrizio &
18 Martin has failed to make prompt payment to subcontractors,"
19 and then it proceeds to describe the articles of the
20 agreement and the requirements on the general contractor
21 for making payments to subcontractors.

22 It cites particularly the fact that the subcontrac-
23 tor for site excavation, Sam Marco Construction Corporation,
24 has indicated that it has not been paid for work dating
25 back to May of 1964 and then it goes into a good deal of
documentation on that.

3a Qg 2

Fowler-redirect

The next item is that the firm of Fabrizio & Martin has disregarded the architect's instructions and then it details a number of areas in which the contractor has not followed the directions of the architect.

After all of this it concludes that the architect certifies to the Board that under Article 22 the owner has cause for action which may include action on payments.

MR. YAVNER: I offer this in evidence, your Honor.

MR. POWERS: No objection, your Honor, except for the continuing objection I mentioned before.

MR. TRAGER: My objection is the same as made before, your Honor.

(Defendant's Exhibit 34 received in evidence.)

THE COURT: Actually, Mr. Trager has no basis for an objection. This is being introduced solely with regard to the case between the Board and Fabrizio.

MR. YAVNER: These next two exhibits don't refer specifically to payment, your Honor, but they do show that Fabrizio at this point intime had left the job and had been shut down and I am introducing them primarily to show this historical fact.

The exhibit after that shows the effect of that delay upon the general operations and the other contractors.

1 3a Qg 3

2 Fowler-redirect

3 MR. POWERS: Your Honor has already ruled.

4 MR. YAVNER: All right, I withdraw that.

5 MR. POWERS: I don't think there is need for com-
6 ment then.

7 MR. YAVNER: This next exhibit dated February 5,
8 1965, is a formal notice, your Honor, to Fabrizio stating
9 that because of these various certifications by the archi-
10 tect he is notified to rectify the conditions, come back
11 on the job, or that action will be taken to terminate his
12 contract and that a notice of this has been sent to the
13 bonding company, Aetna.

14 THE COURT: I won't allow that. That has something
15 to do with this action but it has nothing to do with the
16 equities.

17 MR. YAVNER: This one I do think should come in
18 and it ought to come in with the one I just put aside.

19 This is a notice to Aetna, it is dated February 5,
20 enclosing a copy of the notice sent to Fabrizio and saying
21 "We should appreciate it if you should communicate with us
22 before the expiration of the seven-day period set forth
23 in the notice in order to take all the necessary steps to
24 mitigate damages and the like."

25 I think from this point on we are showing the in-
volvement of Aetna and its refusal to do anything.

1 gtg 4

Fowler-redirect

2 THE COURT: What is the date of that?

3 MR. YAVNER: February 5, 1965. This is in con-
4 nection with the first stoppage.

5 MR. POWERS: This has nothing to do with the il-
6 legality.

7 MR. TRAGER: Your Honor, after February 5, 1965,
8 even though we are not permitting the parties, and yester-
9 day there was discussion on this, the fact is that the
10 parties went back and the agreement referred to and they
11 subsequently entered into a supplemental agreement and
12 continued work up until finally the termination. I can't
13 see this.

14 I object strenuously to that. It is no notice of
15 the legality underlying so it does not go to the under-
16 lying equities between Aetna and the Board.

17 THE COURT: It will not be admitted.

18 MR. YAVNER: Your Honor--

19 MR. POWERS: If I may, your Honor, I think Mr.
20 Yavner should instead of, in effect, asking the Court or
21 telling the Court what he has and suspecting that he should
22 introduce it into evidence as he is apparently doing --

23 THE COURT: I am taking these explanations, Mr.
24 Powers, as an offer and I am ruling on them in that way.

25 MR. YAVNER: My next offer is of the supplemental

1 gtg 5

 Fowler-redirect

2 agreement which is not in evidence and I am not offering
3 it for any relationship to damages we expect against them
4 now, the liquidated damages or the like, but because it
5 sets the underlying stage in the same way that the first
6 exhibit, the basic contract between the two does. It also
7 does set the basic contract with Aetna in perspective as
8 well.

9 Only for that purpose do I offer this in evidence
10 now.

11 MR. POWERS: It does not set the stage for any-
12 thing as far as the plaintiff is concerned. It does not
13 modify the terms and conditions of the prime contract
14 with respect to payments to be made except for that De-
15 cember 1964 payment due to Fabrizio & Martin and Mr. Yavner
16 apparently is determined to get this supplemental agree-
17 ment into evidence when it is not part of the case.

18 I can't for the life of me see his continued at-
19 tempt to put it in evidence. It has no bearing on the
20 issues involved here.

21 MR. YAVNER: There is a whole article here on
22 payment. Page 10, Article 5 of the agreement.

23 MR. POWERS: The supplemental agreement was a
24 result of negotiations between parties. Whether one party
25 was more successful than another party in negotiating in

1 gtg 6

Fowler-redirect

2 the supplemental agreement is immaterial here.

3 THE COURT: I think what I am going to do, I am
4 really not going to be in a position, with the remarks that
5 Mr. Yavner has made about it, and also that it resolves
6 some of the difficulties that you have alluded to, in-
7 cluding the failure of the Board to pay on time, I am really
8 not going to be able to make any intelligent determination
9 without reading it.

10 I think what I am going to do, the most expedi-
11 tious thing to do, is for you to introduce it and reserve
12 judgment on it until such time as I have had an opportunity
13 to study the document.

14 (Defendant's Exhibit 41 received in evidence.)

15 MR. YAVNER: As part of this same continuing of-
16 fer, I am jumping now to November 12, 1965, and these
17 are several communications relating to the matter of
18 payment in connection with difficulties that arose after
19 the supplemental agreement.

20 If you wish the witness to describe it or I will
21 show it to Mr. Powers first --

22 THE COURT: Mr. Yavner, it is your case.

23 Q I show you Exhibit 49. Please describe it for
24 the record.

25 A Exhibit 49 includes receipts for certified mail,

1 gtg 7

2 Fowler-redirect

3 a statement from Vincent Fabrizio on School District
4 letterhead saying he has received payment of requisition
5 No. 17 in the amount of \$196,604.63 under protest.

6 Attached to this is a letter from the Superintendent-
7 ent of Schools to Fabrizio & Martin dated November 12, 1965,
8 referring to payments that had been withheld from Fabrizio
9 & Martin because of liquidated damages.

10 Also attached is a copy of a letter to Aetna
11 Casualty & Surety Company informing the company of this
12 action and a copy of a letter to Louis Yavner from Aetna
13 Casualty & Surety Company acknowledging receipt.

14 THE COURT: Is this letter after Fabrizio walked
15 off the job?

16 THE WITNESS: Before, your Honor, the November be-
17 fore the March in which he walked off the job.

18 MR. POWERS: He was terminated in March of 1966,
19 your Honor, if I may.

20 THE COURT: Although I say walked off, I have not
21 made up my mind one way or the other.

22 MR. YAVNER: I offer this in evidence.

23 MR. POWERS: It deals with liquidated damages,
24 your Honor, and that is the reason for the objection to
25 the requisition as prepared by the architect but other than
 that I have no objection. Liquidated damages are not in

1 gtgQg 8

Fowler-redirect

2 issue.

3 THE COURT: I gather that the letter says that we
4 are not claiming --

5 MR. POWERS: We are withholding x number of dollars
6 because of your delays.

7 Q I show you Exhibit 50 for identification. Please
8 describe that.

9 A Exhibit 50 is a receipt for certified mail, a
10 letter of November 16, 1965, from the Superintendent of
11 Schools to Fabrizio & Martin, notifying them that moneys
12 would be withheld from their requisitions in accordance
13 with the provisions of the supplemental agreement.

14 Attached to it is a copy of a letter from the
15 architects to the Board certifying that this action was
16 in order and another letter from the Superintendent to
17 Aetna Casualty & Surety enclosing copies of this correspond-
18 ence and informing them of the action.

19 MR. YAVNER: I offer this in evidence.

20 MR. POWERS: I have the same comment with respect
21 to Exhibit 49.

22 Q Would you please describe Exhibit 53 for identi-
23 fication.

24 (Defendant's Exhibit 49 received in evidence.)

25 A Exhibit 53, certified mail, again a letter from

1 Qg 9 Fowler-redirect

2 the Superintendent to Fabrizio & Martin.

3 This one is dated January 13, 1966, also notify-
4 ing him that payments would be withheld, the reasons for
5 the withholding, the certification of the architect is
6 attached.

7 (Defendant's Exhibit 50 received in evidence.)

8 MR. YAVNER: I offer this in evidence.

9 MR. POWERS: No objection.

10 (Defendant's Exhibit 53 received in evidence.)

11 Q I show you Exhibit 54 for identification.

12 Please describe that.

13 A This has receipts for certified mail, a copy of
14 a letter from the Superintendent to Fabrizio & Martin
15 showing copies to Aetna, Harkness, Yavner and Hynes, a
16 letter indicating that checks were mailed to Fabrizio on
17 Friday, January 14 and then summarizing the reason for
18 the delay in payment in a chronology beginning with De-
19 cember 29, 1965 and going through the date on which the
20 check was mailed to Fabrizio.

21 It also contains a reference at the end that the
22 Board was very eager to meet with Fabrizio and the archi-
23 tect to discuss the claims of Fabrizio and get them re-
24 solved.
25

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Fowler - redirect

509

Q What is the date of that?

A January 19, 1966.

MR. YAVNER: I offer this in evidence, your Honor.

MR. POWERS: No objection, your Honor.

THE COURT: All right.

(Defendants' Exhibit 54 received in evidence.)

Q I show you Exhibit 55. Please describe that, consisting of three letters.

A Exhibit 55 were certificates of certified mail received, the first letter dated March 4, 1966, from the superintendent to Fabrizio and Martin indicating receipt of that firm's letter of March 2, 1966, in which Fabrizio indicated his intention to suspend work on the Middle School Project and the second paragraph from the superintendent indicates that should Fabrizio walk off the job the Board would be obliged to hold him in default and require the bonding company to complete the job.

Copies of this letter are indicated to Aetna, Harkness, Hinds and Yavner.

The second letter is a letter of the same date from the superintendent to Aetna enclosing a copy of the letter received from Fabrizio and the letter sent to Fabrizio and asking because the urgency of the situation and our desire to mitigate possible damages caused by further delay, requesting

701a

gte 2

Fowler - redirect

510

the bonding company to make necessary arrangements to employ another contractor to finish Fabrizio's work. The third letter is a copy of the letter from Fabrizio and Martin to the Board of Education indicating receipt of payment, the claim that the Board is still in default in payments and notifying the Board that they intended to suspend work immediately.

MR. YAVNER: I offer that in evidence, your Honor.

MR. POWERS: No objection.

(Defendants' Exhibit 55 received in evidence.)

Q I show you Exhibit 57 for identification.

A Exhibit 57 consists of receipts for certified mail. The letter is dated March 8, 1966, from the superintendent to Fabrizio and Martin confirming the contents of a telegram which had been sent to Fabrizio indicating his failure to report to the work which constitutes failure to perform work required in article 21 of the contract documents, giving the firm three days notice that without prejudice to any other remedy the Board intends to make good such deficiencies and deduct the cost.

THE COURT: This is on the eve of this litigation, is that correct?

MR. YAVNER: That is correct.

THE COURT: I will exclude that. I don't see any reason for that.

702a

gte 3

Fowler - redirect

511

MR. YAVNER: My next two exhibits are notices to the bonding company and Fabrizio of notices of default.

THE COURT: But the bonding company isn't complaining about that. The issue in the case is whether when you entered into the agreement you notified them of the underlying conditions.

They aren't complaining that you didn't notify them that Fabrizio terminated or walked off the job.

Q I show you Exhibit 60. Please describe that.

A This is a letter dated March 28, 1966, certified mail, National Bank of Westchester from this witness indicating that the contract between the Board and Fabrizio had been terminated by virtue of the default of the contractor, referring to the fact that the National Bank of Westchester holds bonds pursuant to an escrow agreement dated November 16, 1964 and further notifies the bank that the Board or that these bonds must now, together with the coupons attached, be delivered to the Board as they become due.

Copies of the letter are to the broker, Herbert H. Simms, to Fabrizio, to the Board President and to Mr. Yavner.

Attached to it is a statement of assets.

MR. POWERS: Your Honor, I think we have already covered this. This has to do with that \$5,000 loss and the school taking over the bonds.

gte 4

Fowler - redirect

512

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2 THE COURT: That has nothing to do with the issue
3 here. It will not be admitted.

4 Q I show you Exhibit 64 for identification, please
5 describe that.

6 A Exhibit 64 is a memorandum to the Board of Education
7 dated January 5, 1966 from John Beardsley, the Clerk of the
8 Works, reporting on construction for the period ending January
9 5, 1966.

10 MR. POWERS: If I may, your HONOR, I will object
11 to this.

12 This is internal and has no indication, as far as
13 I know, that a copy was forwarded to the plaintiff or the
14 additional defendant. The witness was not apparently the
15 recipient of the memo or its author.

16 MR. YAVNER: It is an official report of the Board
17 of Education, a public agency, and I submit it for that reason.

18 THE COURT: An official report of the Board?

19 MR. YAVNER: Of one of its employees to the Board
20 of Education.

21 MR. POWERS: Mr. Beardsley was the architect represen-
22 tative.

23 THE WITNESS: Mr. Beardley was appointed by the
24 Board.

25 MR. YAVNER: He was the Clerk of the Works.

gte 5

Fowler - redirect

513

THE COURT: I doubt that is going to be of any help in resolving the issues in this case, Mr. Yavner.

Q I show you this document.

Will you please identify it.

A This is an analysis of change order number 1 to Mars Associates, Normel Construction Corporation, prepared by the architect at the request of the Board indicating which items of work under change order number 1 were the responsibility of Fabrizio and Martin and which items of work under change order number 1 were not the responsibility of Fabrizio and Martin.

MR. POWERS: No objection, your Honor, that is already in with the answers to interrogatories.

THE COURT: You already have it in?

MR. POWERS: It is annexed to the answers to interrogatories so it is a part of the Court file so I have no objection.

THE COURT: All right.

(Defendants' Exhibit 122 received in evidence.)

MR. YAVNER: If your Honor please, I have no further questions of Dr. Fowler.

THE COURT: All right.

Mr. Powers, do you have anything on recross?

MR. POWERS: Yes.

gte 6

Fowler - recross

514

RE CROSS EXAMINATION

BY MR. POWERS:

Q Doctor, if you would go back to the schedule that you prepared last night, please.

A Yes, sir.

Q That Defendants' Exhibit 99.

If I understand you correctly, you stated that the increased construction costs were \$165,430.

A The increased completion costs.

Q In connection with your arriving at that figure you have a figure of \$85,051 for what you called Fabrizio and Martin's subs and other disbursements.

A That's correct.

Q And those other disbursements include the cost of sandwiches for a Board meeting or some such meeting, overtime for secretaries, cost of photographs in connection with the existence of the site at the time of March 1966 and similar items of that kind, is that not true?

A Yes, I described each of those to the Court.

Q All those items are still in this figure and none of them have been eliminated?

A That is correct.

THE COURT: Items of that kind, are they all described in the various exhibits in evidence so that I will

1 jge 7

Fowler - recross

515

2 be able to see what you are describing that \$85,000 to?

3 MR. POWERS: There is one exhibit annexed to the
4 original answers to interrogatories which lists all of those
5 items.

6 MR. YAVNER: There is an exhibit in addition to that
7 which lists them all. If you meant, is there a description
8 of what each item in that list is, that comes only in Dr.
9 Fowler's testimony.

10 THE COURT: I see.

11 MR. POWERS: On the answers to interrogatories it
12 lists the items with the description, such as the first one,
13 Julius Watson roof to finish job, overtime to secretarial
14 overtime--

15 MR. YAVNER: We are in agreement but when and how
16 and whose overtime came from Dr. Fowler.

17 THE COURT: Dr. Fowler described what was involved
18 in each of those items, all right.

19 I have doubt that your lunch for Board meetings is
20 a proper item to be charged to Fabrizio.

21 Q And the figure you gave for Mars, Normel, \$428,000
22 also includes the change order the summary of which was just
23 introduced in evidence?

24 A It includes those items in that change order that are
25 attributable to Fabrizio and Martin only.

pge 8

Fowler - recross

516

Q Based on what the School Board has contended, are not part of Fabrizio's work or are part of Fabrizio's work?

A Based on the architect's certification.

Q And the School Board's contention?

A Right.

Q I had some difficulty, Doctor, in following how you arrived at the increased architect's fee.

As I understand you started out with a figure of \$2,988,000, is that correct?

A No. That is a figure in the computation but I started out showing how that figure was arrived at. Would you like me to review that?

Q Would you please.

A The first item was the \$2,429,476. This item is taken from requisition 22, the last Fabrizio requisition, and it is the figure on that requisition that indicates the work Fabrizio had completed through March or to March 1, 1965.

Then added to that figure are the amounts of construction, only construction for Mars, Normel, MacNamee and Bradhurst.

Q If I may interrupt just to clarify this. I don't mean to intrude, and if I am imposing on you please advise me. That would mean you included the 428,000 plus for Mars Normel, the 102,000 for MacNamee and the 22,000 for Bradhurst?

pge 9

Fowler - recross

517

You add that to two million four?

A Right.

Q Was any part of the monies paid to Mars, Normel, MacNamee or Bradhurst part of the original contract documents?

A I am not sure I understand your question.

Q Was any part of that money monies that represented work that was to be performed by Fabrizio and Martin under its contract?

A It is my understanding that all of those three payments, Mars, MacNamee and Bradhurst constituted work that was to be completed by Fabrizio and Martin under its contract.

end 3b

tk 4a

gte 1

Fowler - recross

518

Q So then they were all included within the original contract price to Fabrizio and Martin of three million, eight hundred thousand dollars, all of those costs?

A That wasn't his contract, three million eight.

Q I am sorry, that was the bond issue.

Excuse me.

The two million plus, whatever his contract price was?

THE COURT: Not the contract price. What you include is not only the contract price originally, but all change orders.

Q The contract price as amended, I will leave it that way.

A Those are the two figures I compared, the 2,982,000 which represents the construction work certified by the architect as having been completed by whichever contractor, Fabrizio, Mars, MacNamee or Bradhurst, and I compared that with the amount which the Fabrizio contract, including change orders, were that stood as of the day he left the job, 2,641,000.

Q But the payments to these three contractors, Mars, Normel, MacNamee and Bradhurst, were payments for work included within the original contract documents issued to Fabrizio and Martin as amended up to the date it left the project or was terminated?

pte 2

Fowler - recross

519

1 A That's correct.

2 Q And these are fees that the School Board would have
3 had to pay to the architect.

4 A If after the first of March everything had gone
5 smoothly and Fabrizio had finished the job, we would have
6 had to pay fees on \$2,641,697.

7 THE COURT: That is not only if things had gone
8 smoothly, but if there were no additional change orders?

9 THE WITNESS: Yes, that's correct.

10 Q Doctor, do you know whether there were any pending
11 claims by Fabrizio and Martin prior to March of 1966?

12 A I believe Mr. Crane has testified to a meeting that
13 took place in February 1966 where pending claims were discussed.

14 Q Are you familiar with those claims at all.

15 A Not the details of it. I know the meeting took
16 place.

17 Q Do you know the dollar value of those claims?

18 A No.

19 Q Or an approximation of the dollar value?

20 A No, I do not.

21 Q Do you know what the architect conceded that some of
22 those claims were valid and it was just a question of proving
23 the dollar value?

24 A The Board had not been notified on the outcome of
25

gte 3

Fowler - recross

520

that meeting when Fabrizio walked off the job.

Q The board had not been notified of that fact?

A No.

They had been notified--we knew of the meeting. We did not know the outcome of the meeting, what had been agreed to, what had not been agreed to.

Q Are you saying that the Board was not advised as to whether any of the claims of Fabrizio and Martin might have been valid?

A There was no opportunity for that to take place or it did not take place following the meeting. Fabrizio walked off the job and we then moved on from there.

Q When did the meeting take place?

A In February .

Q Early February, correct.

A As I recall.

Q In fact, I think Mr. Crane testified it was February 1st or February 8th, somewhere in there.

A Whatever he testified to.

Q When was Fabrizio and Martin terminated? It was in March, was it not?

A Early March, the beginning of March..

Q So it was over a month that the School Board had time or the architect had time to notify the School Board of

1 gte 4

Fowler - recross

521

2 what claims Fabrizio and Martin had, correct?

3 A I don't know the substance of the meeting. I don't
4 know what the opportunity the architect had, how much work
5 there was left to be done on it.

6 Q Now, let me ask you this--

7 MR. YAVNER: Your Honor, I will object to these ques-
8 tions. The witness has testified other than the fact that the
9 meetings were held, he does not know the substance of the
10 meetings, what happened, and, therefore, I think it is improper
11 to continue to ask these questions of him.

12 MR. POWERS: What I am trying to determine is whether
13 the architect, who was the owner's representative, even passed
14 the information along to the School Board that Fabrizio and
15 Martin did have claims and what the possible dollar value of
16 those claims were.

17 THE COURT: All right. Overruled.

18 Q Doctor, is it your testimony that at no time after the
19 meeting of early February between the architect and Fabrizio
20 did the architect advise the School Board as to whether
21 Fabrizio and Martin had claims against the School Board?

22 A I don't recall any such communications.

23 Q You have reviewed your records in connection with
24 preparing for this trial, have you not?

25 A I have.

1 gte 5

Fowler - recross

522

2 Q Have you come across any such notification in your
3 preparation?

4 A Not that I recall.

5 Q Doctor, do you know how the School Board stood bud-
6 getwise as of early March 1966?

7 I believe you testified earlier and we had an exhibit
8 that indicated as of December 1965 the School Board was under-
9 budgeted in the sum of approximately \$105,000, if my recollec-
10 tion is correct.

11 Do you recall?

12 A I recall that.

13 Q Do you know what the budget situation of the school
14 was in early March 1966?

15 A As I recall from prior testimony, we had used
16 \$136,000 of furniture and equipment funds, transferred them
17 using them as a contingency, in order to cover increased
18 costs from change orders, so in terms of the original budget
19 we were approximately \$136,000 behind.

20 Q Here you are making reference to the monies for
21 furniture and equipment.

22 I am wondering whether there might have been any
23 other reasons or any other computations that came into play
24 which made the deficit budget even larger than the \$136,000
25 that you just testified to.

gte 6

Fowler - recross

523

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2 A No. For all intents and purposes, there are con-
3 struction contracts and change orders as one item of the budget,
4 there is furniture and equipment.

5
6 Now, there are perhaps six or seven other items, all
7 of which shortly after the job began were fully committed,
8 so the only flexibility, if you will, budgetary flexibility,
9 lay in the furniture and equipment account.

10 Q Let me ask you this:

11 You have just admitted that change orders, I think
12 15 and 16--I should say you are using change orders 15 and 16 in
13 arriving at your total Fabrizio and Martin contract price of
14 \$2,641,000, correct?

15 A Yes.

16 Q Are changes 15 and 16 included in that budget figure
17 where you have a deficit of \$136,000?

18 A I would need to review that document if you can give
19 it to me. It is the memo from me to Dr. Alhf on the need to
20 issue \$250,000 more in bonds.

21 Q Was that this morning that you testified to?

22 A Yesterday Mr. Trager was examining me on it.

23 Q That was your memo?

24 MR. TRAGER: Here it is. (Handing)

25 Q That is additional Defendant's Exhibit A.

A Now would you repeat your question, Mr. Powers?

gte 7

Fowler - recorss

524

Q Are change orders 15 and 16, I believe, or 16 and 17--

A 15 and 16.

Q Are change orders 15 and 16 included in that deficit figure of \$136,000?

A No, they are not.

Q And those two change orders amounted to a little better than \$20,000, isn't that correct?

A I think that's about correct. I think 19,000 on one and 1,000 on the other.

Q So if those two change orders were included, the deficit then would be approximately \$156,000, would that be correct?

A Yes.

Q In arriving at that modified figure of \$156,000, was any consideration given to claims of Fabrizio and Martin that had not been approved by the School Board?

MR. YAVNER: Objection to the form. He said in arriving at that modified figure of \$156,000 was consideration given.

All that has been developed is that he has asked Dr. Fowler to make arithmetical computation right now and has not brought out any evidence that the School Board or anyone ever considered that in arriving at this figure some years

1 gte 8

Fowler - recross

525

2 ago.

3 I am objection only to the form of your question.
4 It misleads.

5 MR. POWERS: I think, your Honor, the fact is that now
6 the deficit, according to Dr. Fowler and the testimony that
7 has been introduced through him, that deficit is about \$156,000
8 as opposed to--

9 THE COURT: He is not objecting to that. I don't
10 think the objection is valid. It seems to me obvious you are
11 asking Dr. Fowler now with the revised figures that we have as
12 to whether or not that revised figure which you now claim to
13 be \$156,000--I don't know whether Dr. Fowler agreed; he put
14 the figure at \$136,000--whether that included claims that
15 Fabrizio had, whether that was included in it, which might
16 make that figure even larger and, therefore, would tend, I
17 suppose, to reduce that \$165,000 figure which was a part of the
18 budgetary cost.

19 All right.

20 Q Do you recall the question, doctor?

21 A I would repeat that the \$136,000 included only those
22 change orders and extra costs that were on record as of the
23 12th of April, 1966, when this estimate was made.

24 Q Then let me summarize with this question, if I may.

25 That deficit figure of \$136,000 would be increased by

gte 9

Fowler - recross

526

any additional change orders or any additional approvals of claims by Fabrizio and Martin, is that correct?

In other words, the deficit would become larger if you add on approved change orders or approved extras to Fabrizio and Martin?

A If those change orders are extras. There are also credit change orders.

THE COURT: Let me see what I understand.

I will not deal with the 136, I will deal with the 163,000 figure, which I think you arrived at in the same way.

Am I to understand--I had assumed that when you made the calculations that the \$165,000 which you say is the amount of the bond issue, which was a true reflection of increased costs over the original, did you include in that the change orders which had not been approved by the Board but which you did include to make up that two million six figure?

THE WITNESS: That's correct.

THE COURT: You included all that in?

THE WITNESS: I included the change order--everything that was shown on Fabrizio's last requisition that we didn't pay but nevertheless he submitted it, so I included change orders 15 and 16.

THE COURT: Which brought the figure up to two million six?

pte 10

Fowler - recross

527

THE WITNESS: That's correct.

THE COURT: That is what I wanted to know.

Q Referring to the bond issue on the different figures of \$250,000, \$210,000, \$220,000, whatever it is--

A It is \$250,000.

Q In connection with that bond issue, were bonds issued for or did that bond issue include the cost of extra work performed by Mars Normel, MacNamee and Bradhurst that were not part of the Fabrizio and Martin contract?

A Yes, but it is not in the \$165,000 figure.

Q Tell me, the \$165,000 figure, is that the 66 per cent of the \$250,000, is it?

You testified earlier about--

A \$165,000 in relationship to the \$250,000 is 66 per cent.

Q How do you arrive at that? I am just not clear on this, how you arrive at that \$165,000.

A That is the result of the first calculation. Our excessive construction--the \$250,000 in bonds was used basically to cover our cost of completion and then other costs amounting to \$85,000, some of which--

Q This is what I want, a breakdown of that \$250,000. You may have given it, but I am just not clear on it.

A All right.

gte 11

Fowler - recross

528

Q How did you break that \$250,000 down and determined that \$165,000 was attributable to Fabrizio and Martin?

A The \$165,000 represented our completion costs. We could not have completed the work following the issuance of these completion contracts with the funds available, so the \$250,000 that was floated in additional funds were used to pay our additional completion costs and then to pay back the money that had been borrowed from the line item on furniture and equipment.

That is why, as I understand it, only that part of the \$250,000 relating to completion costs is applicable and that's the 66 per cent.

Q That is what I want a breakdown on.

As I understand what you are testifying to is \$85,000 of the \$250,000 was applied to furniture and fixtures.

A Yes, to restore that account as much as we could.

end 4a

4b am

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Fowler-recross

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A Yes.

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Q So how does that figure become reduced?

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Q It seems to me, Doctor, you are bouncing back and forth.

18

19

Why couldn't you restore the \$136,000 out of the \$250,000 bond issue?

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A Because we had to pay our construction costs out of the bond issue. You cannot pay construction costs out of operating funds.

23

24

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Q But you originally had a bond issue of \$4,050,000 so this was part of your construction. The additional \$250,000 was a bond issue that was obtained for construction

1 gtg2]

2 Fowler-recross

3 costs, so why could you not take that \$136,000 out of the
4 \$250,000, which was a bond for construction cost?

5 A Because our first priority is for the construction
6 of the school. We were limited in how we could pay for
7 the construction of the school. We had to pay for it out
8 of the proceeds of the bonds.

9 As I have already testified, those proceeds were
10 not adequate as of March-April 1966.

11 Q As of March 1966, without including the two
12 change orders 14 and 15, the school had a deficit of
13 \$136,000 in construction cost, correct?

14 A We had \$136,000 less in our furniture and equip-
15 ment account than we had started with.

16 Q Yes. But that is because you had used that
17 \$136,000 for construction costs, correct?

18 A That is correct.

19 Q So you had a deficit of \$136,000 in your construc-
20 tion costs and those were \$1-36,000 that were taken from
21 furniture and fixtures and put into actual construction
22 costs, is that correct?

23 A That is correct.

24 Q You thereafter issued a bond for \$250,000, cor-
25 rect, or bond issue?

A That is correct.

1 gtg 3

 Fowler-recross

2 Q That bond issue could be used for construction
3 cost, correct?

4 A Yes.

5 Q Why was it not possible to take that \$136,000
6 deficit out of the \$250,000 bond issue that you floated
7 apparently some time after or in and around 1966?

8 A Because the construction costs were so high it
9 would not permit it, only \$80,000 could be taken out of the
10 \$250,000.

11 Q Why \$80,000? I don't follow this, Doctor. I'm
12 sorry, I may be thick.

13 A The completion costs were \$165,000. That only
14 left \$85,000 that could be used to restore the furniture and
15 equipment.

16 THE COURT: Plus the fact, if I understand Dr.
17 Fowler's testimony, the \$136,000 which you are referring
18 to was used in construction and was taken out of the
19 furniture, whatever the proper name is. He has not
20 allocated that amount to the amount that is now being
21 charged or in the theory now being charged to Fabrizio &
22 Martin and I suppose to the additional defendant.

23 What he says, if I understand his testimony, is
24 that we went \$136,000 over, we took it out of the furni-
25 ture account and, therefore, that meant when we issued the

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Fowler - recross

bonds what we needed to complete construction was \$165,000.

He is making the assertion that that \$165,000 which actually went to construction is the proper allocation of damages to Fabrizio and, therefore, he is--

MR. POWERS: I think the School Board is flipping back and forth, your Honor. They originally had \$136,000 in construction cost before the termination ever took place.

THE COURT: No, I don't think they are flipping back and forth. I think, as a matter of fact, that formulation, as far as I can understand, is that Dr. Fowler has indicated that he could have, instead of charging the School Board or instead of charging Fabrizio with the entire \$250,000, that since they had what had been allocated for furniture originally, that \$136,000, which was used actually on the first bond issue was actually used for construction and, therefore, there was no added charge, really, to the plaintiff.

He has now figured that the additional cost for actual construction out of the new bond issue came to only \$165,000.

Whether you object to the formulation or not, I don't see anything wrong with that formula. I think what he has done has dropped what had been argued before was actually that you were being charged with furniture costs

1 gtg 5

2 Fowler-recross

3 and charged with the whole \$250,000, part of which were
4 actually moneys that went to pay for furniture.

5 But he is arguing or he is asserting that \$165,000
6 of the bond issue that was the new bond issue, that that
7 actually went for construction of completion of the school.

8 Isn't that what you are saying?

9 THE WITNESS: Yes.

10 MR. POWERS: That is what he is saying, your Honor,
11 but it seems to me that Dr. Fowler could say anything he
12 wanted with respect to this.

13 I mean this in the proper sense, but Dr. Fowler
14 could say, "Instead of using \$165,000 for construction cost,
15 I will apply that to furniture."

16 He could manipulate the figures because there
17 was, in effect, one bond issue.

18 Where did the overrun come into play? Did it
19 come into play prior to the termination of Fabrizio & Martin
20 or did it come into play after the termination of Fabrizio
21 & Martin?

22 THE COURT: As I understand it, it came into play
23 both ways.

24 MR. POWERS: Both ways and I think we are getting
25 charged \$165,000 which is for all of the additional amount
 but before and after, because there was a loss or a deficit

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gtg 6

Fowler-recross

spending of \$136,000 before there was ever a termination, and we are being charged, I think, with that \$136,000 which occurred prior to the termination and had nothing to do with the termination.

What happens to that figure? I don't think the School Board can juggle and say before the termination we will take \$136,000 out of furniture and fixtures and put it in construction cost, but then after the termination and after we get the additional \$250,000 bond issue, then we are going to juggle the figures back and apply so much to furniture and equipment and so much to completion cost or construction cost.

I think this is exactly what is being done. If there was a deficit of \$136,000 before there still had to be a deficit of \$136,000 at least after the termination and I don't understand how this cannot be the case.

If it is true before the termination--

THE COURT: Maybe I don't understand it, either.

I think I understand it. I think at least to my mind Dr. Fowler has made it perfectly clear. So far as I can understand him, instead of penalizing the plaintiff he has sought to utilize a formulation, assuming there are any damages at all involved, as far as I understand, seems to be fair.

I understand that the \$136,000 figure which had

1 jgtg 7

Fowler-recross

2 been allocated to furniture was used in construction, so
3 you are not being charged with that as any item of damages.

4 The only item of damages is the amount that had
5 to be utilized by virtue of the issuance of a new bond
6 issue over and above the first bond issue to complete the
7 building and that came to \$165,000.

8 It seems all very clear to me. I don't understand
9 where the confusion is, frankly. Maybe it is too clear
10 to me. Maybe I should be a little unclear, but it seems
11 very clear to me.

12 I really don't understand where the confusion is.

13 Yes, Mr. Trager?

14 MR. TRAGER: Your Honor, I am confused, too.

15 THE COURT: It seems to be that Dr. Fowler and I
16 are not confused.

17 All right.

18 MR. TRAGER: Defendant's Exhibit C, which Mr.
19 Fowler has, the memorandum of yesterday--

20 MR. POWERS: Exhibit A.

21 MR. TRAGER: Exhibit A; of the \$250,000, showing
22 the underlying need for the \$250,000, in that he indicates
23 the \$165,000 that you referred to of construction cost and
24 goes on to indicate the need for \$110 and completion, which
25 represents a cash crunch of \$250. The \$136,000 he

1 gtg 8

2 Fowler-recross

3 indicates was for extras, rock, that \$136,000 would be added
4 on to Fabrizio's contract. Yet it is the \$250 which we
5 are talking about for the bond issue and for which we are
6 being charged for interest.

7 The interest of \$174 has now dropped to \$115.

8 Yesterday, what makes it even a little muddier was
9 the fact that Dr. Fowler said that as far as construction
10 costs, they must go to a bond issue.

11 THE COURT: The point is, Mr. Trager, you are rais-
12 ing a different point than Mr. Powers. When you get to
13 the time of examining Dr. Fowler maybe you can bring that
14 out. But in terms of reducing the actual cost of construc-
15 tion, it may well be, and you certainly are entitled to
16 go into it, but the \$165,000 figure and the \$250,000 new
17 bond issue that you utilized, maybe you can show that that
18 part really is not properly allocated for construction, it
19 might be lower.

20 But all I am saying is I am addressing myself to
21 Mr. Powers' analysis and I don't think Mr. Powers has, at
22 least in my mind, in any way shown that the \$165,000 al-
23 location was inappropriate and did not go to construction.

24 It may well be on your examination you may be
25 able to show it.

 Let's move on.

1 gtg 9

Fowler-recross

2 Q In that same regard, Doctor, in arriving at
3 \$165,000, as I understand it, what you did, to be perfectly
4 frank, I don't understand it. I think you arrived at a
5 figure of \$2,807,000.

6 A yes.

7 Q What does that figure represent?

8 A The general heading is payments for general con-
9 struction and site work and the attendant costs in re-letting
10 the contract.

11 Q What figures are taken into consideration in
12 arriving at that? Is that the payments to Fabrizio, the
13 loss of retainnage, the Mars-Normel payments and the Mac-
14 Namee payments and Bradhurst, Fabrizio & Martin's subse-
15 quent and other disbursements and increase for insurance
16 and the clerk of the works and the architect's increase?

17 A That is correct.

18 Q All of those figures tally up?

19 THE COURT: And the loss on the bond.

20 THE COURT: I think he said that.

21 Q And the loss on the bond?

22 A Yes, \$5,103.

23 Q I'm sorry. I see.

24 Q Again, these payments that you have listed for
25 Mars-Normel include extras that were issued to Mars-Normel,

1 gtg 10 Fowler-recross

2 did they not?

3 A Extra to Mars-Normel, but within the requirements
4 of Fabrizio & Martin according to our architect's certifi-
5 cate. I think we went over that.

6 Q Doctor, do you recall my taking your testimony up
7 at the Bedford Middle School I believe it was some time
8 in 1970?

9 A It must have been very early in 1970 because I
10 left in February of 1970.

11 Q That is correct. It was in January of 1970.

12 A I believe I recall that, yes.

13 Q Do you recall we had about three sessions? During
14 the course of those sessions do you recall being questioned
15 concerning the whereabouts of the back-up material for the
16 Mars-Normel requisitions?

17 A I don't recall. I am sure that that might have been
18 covered in the discussion.

19 Q Do you recall at that time advising me that you
20 could not find the back-up for the Mars-Normel requisition?

21 THE COURT: Mr. Powers, the proper and fair way
22 to do that is to get the deposition and show the statement
23 to the witness.

24 MR. POWERS: Which I unfortunately left in my
25 office this morning.

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gtg 11

Fowler-recross

MR. YAVNER: We have our copies if you want them.

MR. POWERS: Thank you.

MR. YAVNER: Do you want them?

MR. POWERS: No, I don't want to waste the time of the Court at this juncture, but I will get them.

Q Doctor, I refer you to Defendant's Exhibit 30 for identification, which is a telegram that was sent to Fabrizio & Martin by the School Board, I believe.

A No, by the architect.

Q And the telegram had to do with the reasons why the architect was recommending the withholding of the December requisition?

A Yes, he would not certify payment of the December requisition.

1 Q And he said because Fabrizio and Martin did not
2 have blue line drawings?
3

4 A Yes, blue line prints on the job.

5 Q Do you know what blue line prints are?

6 A It is my understanding that blue line prints are
7 a special set of drawings--

8 THE COURT: Why should we waste time with that if
9 the architect is here or a representative. He sent the
10 telegram. All that Dr. Fowler is able to do is to identify
11 them as being from those records.

12 MR. POWERS: I have nothing further.

13 THE COURT: Mr. Trager, do you have any recross?

14 MR. TRAGER: Yes, sir.

15 RECROSS-EXAMINATION

16 BY MR. TRAGER:

17 Q Doctor, perhaps we can clarify that point a little
18 on which there seems to be some confusion.

19 With respect to additional defendant's Exhibit
20 A, in there you indicated the need for \$250,000 bond
21 issue, is that correct?

22 A Yes, to sell \$250,000 in additional bonds.

23 Q And that memorandum was dated when, again?

24 A April 12, 1966.

25 Q This was shortly after the alleged or the

1 gtg Qg 2

2 Fowler-recross

3 termination or the alleged default, is that correct?

4 A Yes, and following execution of completion con-
5 tracts.

6 Q And in there you arrive at the figures by which
7 you reach the figure of \$250,000 and what did you indicate
8 in there for completion?

9 A I indicated that the total completion contracts
10 amounted or were estimated to amount to \$626,000 and that
11 at that point we had not received the money back from the
12 National Bank of Westchester on Fabrizio's retainnage but
13 assuming that that money was returned we would have
14 \$515,000 in cash with which to make those \$626,000 worth
15 of payments.

16 So the estimate at this time was our need for funds
17 for completion costs would be \$111,000.

18 Q And the additional money for the bond issue was
19 reason or you reasoned was because of the fact of extra
20 costs in construction, is that correct?

21 A Two things; extra costs in construction plus the
22 \$137,000 in furniture and equipment which we had deprived
23 ourselves of in order to authorize the extras; that is, on
24 the job to that point.

25 Q But at that particular time the extra costs of
 construction was \$136,000, was it not?

1 @g 3

Fowler-recross

2 A That is correct.

3 Q I think you previously testified that on the
4 budget of \$3,800,000 for the construction of the Middle
5 School you had a contingency of how much, do you recall?
6

7 A I believe on examination it was indicated that the
8 contingency at the time of the contract signing with
9 Frabrizio and the other primes was \$8,000 approximately.

10 Q And, Doctor, when you testified this morning and
11 you gave credit for I believe \$2,641,697 for Fabrizio's
12 contract plus authorized extra through requisition or
13 through extra 15 and 16 -

14 A 15 and 16 were included for that purpose, yes.

15 Q Do you know how much that was over and above
16 his original contract? Was the original contract
17 \$2, 489,400?

18 A Correct.

19 Q If you accept my figures and you can verify it
20 yourself, that is \$152,297 in excess of the original con-
21 tract?

22 A Right.

23 Q That is considerably greater than the \$8,000
24 contingency, is that correct? The \$152, that is?

25 A The \$152 is considerably greater than \$8,000, yes.

Q And that is pure, raw construction cost, is it not?

1 Qg 4

2 Fowler-recross

3 A The \$152,000?

4 Q The \$152, yes.

5 A I really have to look at each change order. I
6 assume that is for something under Fabrizio's contract
7 called general construction at site work.

8 Q In addition to Fabrizio's contract there were
9 other primes, electrical, ventilating, heating and plumb-
10 ing, is that correct?

11 A Yes.

12 Q To your knowledge, did they have any extras to
13 their contract?

14 A My recollection is that they had both extras and
15 credits which either balanced out or ended up together
16 negative.

17 Q Is there any record you can check for a summary?

18 A Someone showed me one yesterday, I believe,
19 showed the change orders to the other primes. I think you
20 have it there, Mr. Trager.

21 Q This was 1966?

22 A Yes, March of 1966. This must have been at the
23 time of the re-letting of the contracts. The effect
24 of these change orders is a \$14,000 credit in terms of
25 cost. As I recall, there was something like a \$26,000
change order crediting the owner from the heating and

1 Qg 5

2 Fowler-recross

3 ventilating contractor.

4 Q So that it is somewhere around, if you add up
5 the figures, or in excess of the \$3,800,000 that was ori-
6 ginally budgeted, balancing the net credits and net pluses.

7 Do you know how much the figure is in excess of
8 the \$3,800,000 that was originally budgeted?

9 A What figure are you speaking of? There is no
10 figure here in excess of the \$3,800,000.

11 Q I am not asking you that. You testified with
12 respect to the \$2,641,000 this morning of authorized
13 extras to the contract, that represented \$152,000 in
14 excess of Fabrizio's contract, is that correct?

15 A That is correct.

16 Q I also asked you if there were extras on the
17 other prime contracts and you said you recalled there were
18 extras and credits and you don't know what the net result
19 was?

20 A I do now. It is right in front of me.

21 Q How much?

22 A The net result is a credit of over \$14,000.

23 Q And that plus Fabrizio's extra of \$152,000 would
24 give you something like a net addition to the construction
25 of \$138,000, is that correct?

A That is correct.

Qg 6

Fowler-recross

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Q That is pure construction cost, is it not?

A If you define what pure construction cost is.

Q The cost that you talked about yesterday of the type that would have to be bonded as opposed from coming from the current budget.

A As opposed to furniture and equipment?

Q Is that the type of cost you were talking about?

A Yes. Correct.

Q That is approximately \$138,000?

A Net. Right.

Q I presume that is part of the \$250,000 budget, is that correct? The bond issue, that additional cost in construction; that is. You said that must be financed out of a bond issue. Is that part of the \$250,000?

A No, it was taken out of furniture and equipment. It was part of the \$3,800,000.

Q What is the difference? Construction cost has to be bonded?

A Yes.

Q When you take it out of something else, it has to be put back, it is like taking from Peter to pay Paul, is that not a fair statement?

A We would have to put it back. If we are going to build the school in total the way we intended, that is.

1 Qg 7

2 Fowler-recross

3 Q You built the school and it was occupied in Sep-
4 tember of 1966 or October, right around there?

5 A Yes.

6 Q Was the furniture issued?

7 A Yes, but not totally.

8 Q Not totally?

9 A We didn't have the funds to furnish it totally.
10 Since that time furniture and equipment have been pur-
11 chased at a current budget to complete the furnishings.

12 Q But as far as construction costs you had to pay
13 for them. If you took it from furniture then you had
14 to pay it back and you paid it back through the bond is-
15 sue but part of these are pure construction costs which
16 were authorized extras to the contract, is that correct?

17 A That is correct.

18 Q The \$165 which you talked about this morning,
19 according to your testimony, contained a great many of the
20 items on that schedule appearing in the answers to your
21 supplemental or supplemental answers to interrogatories
22 which went through a schedule including legal fees, sand-
23 wiches and the other items werereferred to, an \$85,000
24 schedule, is that correct?

25 A Correct?

Q That \$165 which you now testified is part of the

1 Qg 8

2 Fowler-recross

3 bond issue of 250, the 85 is part of that, is that cor-
4 rect?

5 A That is correct.

6 Q Doctor, you said yesterday, didn't you, that ex-
7 cept for construction costs items which you might run into
8 like furniture, various and sundry items could be financed
9 at a current budget?

10 A I believe what I said was that of the items
11 included in the Middle School bond issue the only ones that
12 could be furnished out of current operating budgets would
13 be items of furniture and equipment.

14 Q What about the general costs, sandwiches and that
15 kind of thing? You go to the taxpayers for a bond issue
16 for that? Of the 85,000 that we are talking about in
17 this schedule, that is, aside from the construction items?

18 A Is your question could the cost of sandwiches be
19 paid for out of current budgets?

20 Q Yes.

21 A Yes.

22 Q Yet what you have done here is charge \$115,000,
23 representing long term financing over a 26 year period,
24 I believe, to the contractor to raise this money represent-
25 ing some of these items, is that correct?

A The proportionate share of the \$250,000 related to

1 Qg 9

Fowler-recross

2 our completion costs.

3 Q And included in those costs are some of the
4 items which you now say could be financed as a current
5 budget, is that correct?

6 A I said sandwiches could be paid for out of
7 current funds.

8 Q What other type of item on that schedule? Photo-
9 graphs, Doctor, is that the type of item that could be
10 financed out of current budgets?

11 A If they are photographs required in the course
12 of construction they could not. If they are general
13 photographs obviously they could be.

14 Q Doctor, in every sense of the word you are a
15 professional administrator. If the school takes a photograph
16 do they have to go to a bond issue?

17 A I don't think that is a fair question, Mr.
18 Trager. We were in a bond issue. A bond issue had been
19 issued. We were in the course of construction of a
20 school. There were expenses in connection with the con-
21 struction of that school. Photographs were among those
22 expenses because of the need to re-let the contract.

23 Q You went to the bond issue in 1971, though, Doc-
24 tor?

25 A That is correct. The additional --

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Fowler - recorss

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Q These expenses were made in 1966?

A Bond anticipation notes, as you know from testimony, were issued in 1966.

THE COURT: Mr. Trager, I don't want to put you off but I think you have made your point.

The point it seems to me, is that certainly in that \$85,000, and I have already indicated earlier that I had some question about it, but it does seem to me that when I am talking about construction costs I mean the cost of putting some bricks and so forth in the building rather than secretarial overtime and items of that kind, so that the \$85,000, if that is included among that, and I gather it is, among the \$165,000 claim as part of the bond issue, it would certainly be scrutinized by me with a great deal of care to be sure that there are no items that do not, in my judgment, go directly to construction costs.

As I interpret construction cost, that is the added cost for the building itself.

Q Doctor, is it not true that the \$165,000 figure that you calculated this morning includes, if I am not mistaken, all the payments made to Mars, Normel also, is that right?

A Not all of them, no.

Q It does not include all of them?

A No.

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Powler - recross

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Q In that 165 how much is included in the Mars, Normel payments?

A 428,164.

Q And the Mars, Normel contract, did that have an up-set price or a guaranteed maximum of 403,000?

A Yes, it did.

Q I take it you would concede that 428 exceeds the 403 by 25,000?

A As a result of the change order.

Q Is that correct?

A That is correct.

Q And in the 165,000 figure what figures in that comprise the MacNamee and Bradhurst contracts, do you know?

A Yes. MacNamee is 102,017 and Bradhurst is \$29,329.

Q And do you know if there were any extras in that, the 102 or the 101,000 aggregate figures which were not part of the Fabrizio contract?

A I testified that I did not know.

Q I show you Exhibit 29 in evidence, minutes of a regular meeting of the Board, April 13, 1966.

A Yes.

Q Referring to the second page there, is there a resolution with respect to Bradhurst and MacNamee?

A Yes, there is.

Q Would you read that resolution.

A I think I did already in the record but I will read it again, "Resolved that the Board counsel be authorized to prepare agreements with Daniel F. MacNamee and Company and Bradhurst Site Development Corporation for completion of site work for the Middle School at a cost not to exceed \$117,500 and that the Board President be authorized to execute these agreements on behalf of the Board unanimously approved."

Q Your testimony just now indicated that in your 165,000 are contracts with them of 102 and 29 and that totals 131.

A I think I testified that these were payments, not contracts. They were payments.

Q Payments included in the 165 of total aggregate amount of 131?

A That's correct.

Q Do you know if there are extras added on to that?

A I believe we reviewed in cross examination yesterday change orders issued to Bradhurst and MacNamee.

Q That represented work outside the scope of Fabrizio and Martin contract?

A I testified I didn't know whether those were or were not within the scope of the Fabrizio and Martin contract.

Q But the fact is the payments exceeded the resolution

by 14,000, is that not correct?

A That particular resolution, yes.

Q Doctor, with respect to the correspondence that went in this morning--bear with me one moment, your Honor.

THE COURT: Yes.

Q Those exhibits that were introduced this morning, 49, 50, 51, 52, 53--

A 51 and 52 are not here.

Q All except those, they were a different series, you indicated that copies went to Aetna Casualty and Surety, is that correct?

A Yes.

Q Isn't it a fact that all of those letters dealt with the question of liquidated damages?

A All but two appear to deal with liquidated damages in part anyway.

MR. TRAGER: If they weren't offered as far as we are concerned, then I can dispense with them. I want him to testify that there was nothing in those letters with respect to the underlying circumstances under which the contract was let and that they all dealt with liquidated damages pursuant to the supplemental--

THE COURT: That was introduced.

MR. YAVNER: They do deal with another point.

2 THE COURT: None of those documents deal with the
3 underlying circumstances that lead to the letting of this
4 contract.

5 MR. YAVNER: They do deal with payment but it is a
6 different point.

7 THE COURT: He is not interested in that. He is
8 interested in the underlying reason that he had no notice of
9 it.

10 Q Just one more point, doctor, and that is these bond
11 anticipation notes, they are short term financing for current
12 deficits, is that correct?

13 A Bants are notes which may be sold by the School
14 District once the Board has authorized the sale of bonds
15 themselves.

16 Let's say once they have adopted a resolution indica-
17 ting their intention to sell bonds of, in this case, \$250,000
18 they then have the authority to rather than sell the bonds
19 immediately because people wish to wait for favorable markets
20 or other purposes, they can issue or sell notes in the principal
21 amount of the bonds and so a BANT is a bond anticipation, in
22 anticipation of the bond sale itself, a note.

23 Q It is less expensive type of financing than a long
24 term bond?

25 A That is a thing that fluctuates with the market.

I think you know in our particular experience with this \$350,000 the range of interest on BANTS went all the way from 3 per cent up to 6.75. It really depends on the market at the time the notes are negotiated.

Q It must either be paid back at a short term basis, at a current budget or you must retire the BANTS with a long term--

A Or you must replace the principal on BANTS with bond proceeds.

MR. TRAGER: Thank you, doctor.

MR. YAVNER: We have reached the stage where Mr. Fowler may be excused from the stand if there are no further questions of him.

THE COURT: Are you concluded?

MR. YAVNER: Yes.

THE COURT: Thank you, Dr. Fowler, you are excused.

(Witness excused.)

MR. YAVNER: I call Mr. Crane again.

THE COURT: Mr. Trager, the purport of your examination of Dr. Fowler was to show that the \$85,000 item really did not include proper construction charges. That an upset price to Mars, Normel was exceeded by \$25,000 and that should not be charged to the plaintiff and that the upset price to McNamee and Bradhurst was exceeded by roughly \$16,000

which should not be charged to the plaintiff. At the very most you are saying that the \$165,000 item which is charged to extra construction should be reduced to at least \$59,000.

MR. TRAGER: Plus a great many other items.

I don't know if I made the point but I tried.

THE COURT: There are some other items that will come out in examination but at least I wanted to make sure I understand you on that.

All right, Mr. Yavner.

I think the examination of this witness, Mr. Crane, is going to be limited to the back up materials justifying the payments to these various contractors for work which they did.

I hope it is very clear that I am not going over the testimony or any grounds that you went over on the first day of trial.

MR. YAVNER: I wasn't going to go over that. I did intend to ask him questions to clarify some of the matters that came up yesterday morning when Mr. Powers was questioning Mr. Fowler about various matters that related to the architect.

THE COURT: Any of the matters that we haven't included up to his statements, anything concerning Fabrizio's work, yes, that too.

MR. POWERS: I want to note my objection to this by

2 reason of the method that Mr. Yavner is using in introducing
3 his evidence. He is getting to get two bites out of the apple.

4 This material he just introduced again through Mr.
5 Fowler, the back up material, obviously should have been
6 introduced through Mr. Crane in the first place and it wasn't
7 and it gives Mr. Yavner the opportunity now to, in effect,
8 get additional testimony from Mr. Crane with respect to
9 testimony that came out of Dr. Fowler and to that extent he
10 is doing his redirect.

11 THE COURT: I don't think that is a fair statement.
12 I think that whatever the deficiencies were Mr. Crane and the
13 back up material was here because you demanded it.

14 ROBERT F. CRANE, JR. resumed.

15 REDIRECT EXAMINATION

16 BY MR. YAVNER:

17 Q Mr. Crane, I show you Exhibit 108 marked for iden-
18 tification. Please describe the contents of this claim and the
19 backup material to it.

20 THE COURT: What we want Mr. Crane to do is as
21 to whatever you want to ask him as to the back up material.

22 Q Mr. Crane, in connection with Exhibit 108 marked
23 for identification, did you certify or did the firm certify
24 a requisition submitted by Daniel F. MacNamee and Company--

25 THE COURT: I don't want to have problems about this.

1 You are clearly starting a leading question. I don't
2 want any nonsense about this. Give the man the document and
3 let him testify from his own mouth about it.
4

5 Q Please identify this document and tell us what it is.

6 A This is a requisition claim form and certification
7 by our office submitted by Daniel P. MacNamee and Company and
8 it refers to his cost plus contract for completion of the
9 Bedford School. It is in the amount of 3,746.85.

10 Q Can you tell us what the dates are, please?

11 A Dated May 30, 1966. That is the date of the claim
12 form. Our certificate is June 13, 1966. His direct invoice
13 attending the claim form is May 30.

14 Q Are there numbers to the requisition or the certifi-
15 cation?

16 A Yes.

17 Q This is requisition number--

18 THE COURT: Why do you need that?

19 MR. YAVNER: These have come out of order and I want
20 to make sure they are clear.

21 THE COURT: What you want, if you want anything,
22 you have the dates of requisitions in prior testimony. What
23 we want out of this witness is if he has any back up material
24 to discuss that. That is the only purpose of having these
25 exhibits produced in the first place.

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Crane - redirect

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MR. YAVNER: Your Honor, I offer this in evidence at this time.

4

MR. POWERS: Objection.

5

THE COURT: All right.

6

MR. POWERS: I will withdraw the objection. I maintain again, my continuing objection.

8

THE COURT: All right.

9

(Defendants' Exhibit 109 was received in evidence.)

10

Q I show you Exhibit 100 marked for identification.

11

Can you identify this document and please tell us what it consists of?

12

13

A This is a requisition number 1 for work through May 1, 1966, submitted by Mars Associates and Normel Construction, the contractor for completion of general site work.

14

15

16

This is the claim form used by the District, a certificate from our office and back up documents tabulating the computations by which the contractor arrived at the amount of the requisition.

17

18

19

20

Q Did you mention the dates of those?

21

A The claim form is dated May 1, the requisition is for work through May 1. Itself it does not seem to have a date.

22

23

24

25

The summary sheets prepared by Mars are not dated. Various invoices from--

Q I wanted the first date.

A Okay.

MR. YAVNER: I offer this in evidence, your Honor.

THE COURT: All right.

MR. POWERS: No objection, except the continuing objection.

THE COURT: Let us shorten this down. We are wasting time.

Would you please give Mr. Crane all those documents that you are planning to introduce.

The only question you want to ask Mr. Crane about those documents is--give them to him, please.

With regard to each of them, did you examine all of these documents? Take the exhibit that has been introduced. Did you examine the back up material that was submitted?

THE WITNESS: Just now you mean?

THE COURT: No.

THE WITNESS: Or when it was originally submitted?

THE COURT: When it was originally submitted?

THE WITNESS: Yes.

THE COURT: And verified that the work was done?

THE WITNESS: Yes, your Honor.

THE COURT: That is the thing you want identified with regard to each of the items.

1 gte 4

2 cating we reviewed it.

3 The next one is number 104 for identification,
4 invoice number 7, dated November 1, 1966. This has been cor-
5 rected in our office. The final amount of the requisition is
6 \$38,848.18.

7 Again, it has my initials and there is back up material
8 similar to the others.

9 The next one is 105 for identification, eighth invoice.
10 Apparently the date is supposed to be December 1, 1966. By
11 that I mean the little bracket where the invoice date is
12 supposed to be filled in has been left vacant, but there is the
13 delivery date given December 1, and that is apparently intended
14 to give that date.

15 Again, it has back up material from Mars, Normel,
16 letters and so on, it has my initials on it indicating that I
17 reviewed it at the time.

18 The next one is 106, invoice number 3, dated July 1,
19 1966, in the amount of \$101,172.11. It has a break down docu-
20 mentation and it has been initialed by Mr. Beardsley and me.

21 The next one is 107 for identification, invoice
22 number--that is a copy of the same one. That is a copy of
23 the same one, two exhibits.

24 The next is 111, invoice number 7-23, dated July 29,
25 1966, in the amount of \$5,130. This is from MacNamee. It

1 has my initials on MacNamee's invoice, also Mr. Beardsley, and
2 it refers to work, delivery tickets here, daily time sheets
3 signed by Mr. Beardsley.
4

5 They are labor and equipment tickets, daily use.

6 The next one is number 110, invoice 6-44. There is
7 no date on the claim form. There seem to be two requisitions,
8 apparently one from--both from MacNamee. It looks as though one
9 is on his lump sum contract and the other one is on his cost
10 plus contract.

11 There are separate invoices and my initials and
12 Beardsley's initials on the documents.

13 The next one is number 109. It is invoice from
14 MacNamee, dated June 28, 1966. My initials and Beardsley's
15 initials also are on it. It refers to his cost plus contract
16 and there are daily sheets, labor and equipment rentals or
17 equipment use. They are signed on a daily basis by Mr. Beards-
18 ley.

19 I should point out Mr. Beardsley was on the job every
20 day, I was not there every day.

21 Exhibit number 121, a requisition from Bradhurst
22 Site Construction Corporation. It is for paving and rip rap
23 and seeding. It includes four change orders.

24 This one exhibit has a number of requisitions in it.

25 Excuse me, your Honor, there was an elastic on it and

p. 6

Crane - redirect

563

I thought it was one, but apparently there are separate ones.

121 for identification, requisition from Bradhurst, dated May 12, 1967, for various items of site work. It has my initials on it approving it at the time. It is in the amount of \$1,466.45.

The next one is number 120 for identification. It is a requisition from Bradhurst, again, dated February 6, 1967 in the amount of \$1,466.45. This does not bear my initials also directly, but there is attached a letter from me to the Board dated January 17 related to it.

The next one is number 119 for identification, a requisition from Bradhurst, dated December 5, 1966. This is initialed by me, Mr. Beardsley was not on the job at that point in time. It is in the amount of \$1,276 for various items of site work.

Number 118 for identification, a requisition from Bradhurst, dated August 30, 1966, various items of site work. It is approved by Mr. Beardsley and by me on the direct Bradhurst requisition.

The next one is 117 for identification, a requisition from Bradhurst, dated November 1, 1966, in the amount of \$4,316.40. This is for items of site work. It is approved directly with my initials.

Number 116 for identification, a requisition from

1 gte 7
2 Bradhurst, some site work, stone, some boulders, in the
3 amount of \$2,925. This has Mr. Beardsley's initials and mine.
4 It contains back up from Bradhurst of various kinds.

5 Number 115 for identification, requisition from
6 MacNamee, dated September 7, 1966, his number 9-2. It is for
7 extra work not covered by cost plus agreement in the amount
8 of \$4,694.49 before 10 per cent deduction. The 10 per cent
9 deduction was made. This has my initials and Mr. Beardsley's
10 initials and it has an invoice from MacNamee and daily labor
11 and equipment use, trucks, each one signed by Mr. Beardsley.

12 The next one is number 114, requisition from MacNamee,
13 his number 6-46. There is no date typed in, however, it is
14 stamped received in our office July 22, 1966.

15 It is in an amount of deduction of 10 per cent with-
16 holding of \$5,274.88.

17 The next one is number 113 for identification, a
18 requisition from MacNamee, dated June 30, 1966, for extra
19 work not covered by cost plus agreement.

20 Amount after deduction of 10 per cent of \$5,274.88,
21 initialed by Mr. Beardsley and by me and contains the same type
22 of back up information signed by Mr. Beardsley on a daily
23 basis.

24 The next is number 112. It is a requisition from
25 MacNamee, extra work--excuse me, dated May 30, 1966, extra

1 gte 8
2 workmt covered by cost plus agreement, a minor correction in
3 our office of a few dollars, final amount \$3,101.94.

4 That is initialed by me and by Mr. Beardsley and
5 contains the same daily lists of labor and equipment.

6 That refers it says to his cost plus agreement.

7 MR. YAVNER: May we now have these marked in evi-
8 dence?

9 THE COURT: All right, received.

10 I gather what you are admitting is 101 to 106 and
11 109 through 121.

12 (Defendants' Exhibits 101 through 106, respectively,
13 and 109 through 121 respectively, were received in evidence.)
14

gtg 1

Crane-redirect

Q Mr. Crane, I show you Exhibit 122, and ask you to state whether you had prepared this particular analysis?

A Yes, I did.

Q Would you state the basis on which you made a determination that certain extra work done by Mars-Normel was the responsibility of Fabrizio & Martin and certain was not?

A That was a case of consulting the contract documents of the Fabrizio & Martin contract to see whether or not each item of work was included in the Fabrizio & Martin obligation or not and then this consists of a list of items which were in a change order from Mars-Normel.

I should have started that way.

I took each item and put it under a column, a double column headed Work by Mars-Normel which was the responsibility of Fabrizio & Martin, add and deduct, and another column Extra work not chargeable to Fabrizio & Martin.

That was just a simple column.

Then item by item I allocated the amount of the change order to one of those three columns based on my knowledge and reference to Fabrizio & Martin's contract documents, also my knowledge of the job because I was there.

Q And what is the total that should not be charged to Fabrizio & Martin?

1 gtg 2

 Crane-redirect

2 A \$9,167.25.

3 Q And the balance you found should be charged to
4 Fabrizio & Martin?

5 A Yes, sir.

6 MR. POWERS: Your Honor, to shorten the trial,
7 this has been testified to.

8 MR. YAVNER: Not by this witness and just this
9 morning I had the impression that Mr. Trager, in his last
10 remarks, was challenging Dr. Fowler on this.

11 MR. TRAGER: I challenged Dr. Fowler. This
12 witness testified last week and exactly the point that
13 Mr. Powers made is being done now. You are getting two
14 bites of the apple. He is supposed to testify as to the
15 records which he had to put into today and I object strenu-
16 ously to this whole line of cross-examination, -- well,
17 not cross, but redirect or whatever it is.

18 THE COURT: I can't keep all of these things in
19 my head.

20 There is a contention that certain of the amounts
21 as far as I understand are not allocable to construction.

22 Does that deal with that problem?

23 MR. YAVNER: That certain amounts are not charge-
24 able --

25 THE COURT: Certain amounts on the re-calculations

1 gtg 3

Crane - redirect

2 that were made a part of the bond issue for construction
3 were not properly charged to them.

4 Does that deal with that problem?

5 MR. YAVNER: It does in this respect, in that
6 they ask that--

7 THE COURT: Does it deal with that problem, Mr.
8 Yavner?

9 MR. YAVNER: I think that it does, yes.

10 THE COURT: Let me look at it.

11 MR. YAVNER: The respect in which it does, those
12 parts of it that Mr. Crane showed properly chargeable to
13 Fabrizio & Martin are part of the construction cost.

14 THE COURT: No, I don't want that.

15 It was testified this morning that \$165,000 of
16 this amount of what Mr. Trager and Mr. Powers have been
17 attempting to deal with is the issue that that amount could
18 be reduced further.

19 All this does is to indicate the extra cost or
20 increases that were allocated without going into the calcu-
21 lation that Dr. Fowler had done this morning.

22 What we are relying upon in regard to this is
23 Dr. Fowler's calculation as to whether or not that is prop-
24 er and I am not admitting that for any purpose.

25 Let us move on.

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Crane-redirect

Q Do you recall, Mr. Crane, what the guaranteed maximum upset price was in the Mars contract?

A I think the original amount before it was amended by change order was \$403,000.

Q And do you recall the final amount?

A I think it was \$428,000 some odd.

MR. POWERS: I think Mr. Yavner is doing exactly what your Honor told him not to do. He is getting into the material that he originally put in through--

THE COURT: That is not true.

MR. POWERS: No? I'm sorry.

THE COURT: That is not true. This is clearly an appropriate issue of redirect with this witness.

Mr. Trager indicated in his examination of Dr. Fowler, he went into the issue of the upset price that he showed of Mars-Normel at that time was \$300,000.

The amount that Dr. Fowler has charged here is \$428,000.

The only argument, I suppose, that you can make in regard to that is it was certainly proper recross in respect to Dr. Fowler.

The question is, who can more appropriately answer the questions as to whether there was an amendment to the change order which raised that upset price to

1
2 impressed. That is why I remember it so.

3 MR. TRAGER: I will continue that objection, your
4 Honor, to this witness testifying to that.

5 THE COURT: Why didn't you raise that question
6 with Dr. Fowler when Dr. Fowler was on the stand?

7 MR. TRAGER: He said -

8 THE COURT: Mr. Yavner, why didn't you ask that
9 question of Dr. Fowler when he was on the witness stand?

10 MR. YAVNER: Because Dr. Fowler knows the entire
11 situation generally. It is my understanding that he is not
12 competent to discuss particular change orders, that that
13 is Mr. Crane's job.

14 Inasmuch as it had been--

15 THE COURT: When the upset price was raised, was
16 Mr. Crane the one who had the responsibility and obliga-
17 tion of your office of approving it and making a recommend-
18 ation to the Board? Is that correct?

19 THE WITNESS: Yes, sir.

20 THE COURT: All right, I think that is fair. All
21 right. You may ask it.

22 Q Mr. Crane, what was the basis on which the pay-
23 ments to Mars-Normel were raised from \$403,000 to
24 \$428,000?

25 A The Mars-Normel contract, originally guaranteed

763a

gtg 7

Crane- redirect

maximum upset price contract, was based on certain bid documents.

Those documents, because of the pressures in time of the particular situation, had to be prepared as rapidly as possible. Also in order to keep down unnecessary cost to the Board and to the bonding company by virtue of contractors including unreasonable amounts for unknown situations or problems or items of work, we tried to confine the bidding to as small a package as we could and as readily understandable package as we could.

That was the underlying reason behind the three-separate or four separate contracts in the very beginning.

The Mars-Normel contract, therefore, was based on certain work defined as best we could within the time limites. It was spelled out that work not included in the requirements for the bidder for general construction would have to be treated as extras. We had to give him something to quote on and anything beyond that had to be an extra.

Now, there were items that we in the short length of time that we had just plain overlooked and neglected to include in the bid documents. There were other items of work which we had every reason to assume were included in certain Fabrizio & Martin subcontracts.

1 gtg 8

Crane redirect

2 Later, as more information unfolded and after the
3 Mars-Normal contract was signed, it developed that these
4 particular items of work were not included in those sub-
5 contracts.

6 Since we had told the bidders in the first place
7 that they were- obviously the bidder had a claim for an
8 increase in cost.

9 This is the nature of the extras which resulted in
10 the change order to Mars-Normal.

11 Now, in addition to that, as happens in any con-
12 struction job, during the course of the work it became ap-
13 parent or desirable that certain changes should be made.
14 Those are items which I have tabulated as not the responsi-
15 bility of Fabrizio & Martin.

16 THE COURT: All right, we will adjourn for lunch
17 until--

18 MR. TOPLITZ: Your Honor, I have just one state-
19 ment, please.

20 Is this going to be your last witness?

21 MR. YAVNER: No. Mr. Brandes of Mars-Normal is
22 coming back right after lunch, just as he was here yester-
23 day.

24 MR. TOPKUTZL I have five witnesses from
25 Connecticut, your Honor, and I would like as soon as possible

765a

gtg 8a

Crane-redirect

to start our portion of the case.

THE COURT: I would like for all of you to start pushing this case as soon as possible and we are going to push it.

I am glad that you are with me, Mr. Toplitz.
(Luncheon recess.)

1 Qg 1

Crane-redirect

2 AFTERNOON SESSION

3 2:00 p.m.

4 R O B E R T F. C R A N E, resumed:

5 REDIRECT EXAMINATION (continued)

6 BY MR. YAVNER:

7 Q Mr. Crane, when did Mars, if you recall, do the
8 work covered in its change order dated December 2, 1966?

9 THE COURT: I am not interested in that.

10 What difference does it make? He has verified
11 the change order. I don't care when he did the work.

12 MR. YAVNER: I am referring to yesterday's testi-
13 mony and there was a great deal of time spent by Mr. Powers
14 to attempt to establish that a different policy had been
15 followed with Mars than had been followed with Fabrizio,
16 that Fabrizio had been required to submit change order
17 proposals and then do the work afterwards, and that here
18 a different policy was followed, and I want to establish
19 what the policy really was.

20 MR. POWERS: To the contrary, I am trying to
21 show that the policy was consistent, that Fabrizio just
22 as well as Mars was required to do the work before being
23 paid for it and before receiving a check for it.

24 MR. YAVNER: The Mars contract necessitated the
25 procedure followed and it was unlike Fabrizio. I think

1 Qg 2

Crane - redirect

2 it is important for me to show that.

3 THE COURT: What is the importance of it in terms
4 of your element of damages that you are asking for?

5 MR. YAVNER: It does not affect damages. What it
6 does affect is Mr. Powers' attempt yesterday to shake Mr.
7 Fowler's credibility by the questions he was putting and
8 I want to get the facts into the record.

9 Mr. Fowler didn't know them.

10 THE COURT: I don't see where any of this has any
11 relevance at all to the issue of the question of your
12 entitlement to damages.

13 You have testimony from this witness to indicate
14 that there were change orders and that the work was per-
15 formed.

16 If it is brought out by him on any cross-exami-
17 nation any question about it then you can come back to
18 it. But you had too many irrelevancies here.

19 Let's go on with something important.

20 Q Mr. Crane, I direct your attention again to Ex-
21 hibit 122. You will notice item 3 of that schedule re-
22 fers to the elimination of a wood bridge at the Central
23 Building.

24 THE COURT: I thought I had excluded that.

25 MR. YAVNER: You had not.

Og 3

Crane-redirect

1 THE COURT: It was admitted yesterday?

2 MR. YAVNER: These are the minutes of yesterday.

3 THE COURT: That exhibit was admitted yesterday?

4 MR. YAVNER: Yesterday it was referred to as a
5 document. It was admitted today.

6 THE COURT: I thought you gave that exhibit in the
7 morning to Mr. Crane. Isn't that the exhibit which refers
8 to items that were charged to Fabrizio and some that were
9 not?

10 MR. YAVNER: That is right.

11 THE COURT: I thought I ruled that I would not let
12 that exhibit in.

13 MR. POWERS: What is the number?

14 MR. YAVNER: 122.

15 MR. POWERS: This is a document that you requested
16 to see just before lunch, as I recall.

17 THE COURT: I thought you were trying to get it
18 in before lunch. You asked this witness to testify about
19 it and I indicated that that was not proper direct ex-
20 amination.

21 MR. YAVNER: The only purpose for which I am re-
22 ferring to this now is to clarify and rebut the points that
23 were being made by Mr. Powers yesterday in his examination
24 of Fowler.
25

THE COURT: What were those points?

MR. YAVNER: He discussed about six or eight or ten of these items and tried to establish that we were charging for items that we should not have been charging Fabrizio for.

It does go directly to the issue of whether that \$167,000 is valid or not because these are the figures that back it up.

THE COURT: Mr. Powers was using a document, as I recall, which is the document that Dr. Fowler used in his computations which were documents attached to the answer or amended answer to the interrogatories.

MR. POWERS: This is the same document, your Honor. It is a copy of it.

MR. YAVNER: This is attached to the answer of the interrogatories.

THE COURT: I didn't think that was so.

MR. POWERS: This is a copy of the document that I was cross-examining Dr. Fowler on.

THE COURT: All right.

MR. POWERS: However, I think it is objectionable at this time because again Mr. Yavner is getting two bites of the apple and to me it is improper.

He could have put this testimony in through Mr. Crane

Qg 5

Crane-redirect

in the first instance and he knows. He is an experienced trial lawyer, your Honor. He knows how to try a case and he is getting a second bite at the apple.

He is waiting to see what my cross-examination will be of Dr. Fowler before he questions Mr. Crane about the same document.

This is my objection and this was my objection initially from the start of the trial.

THE COURT: I think in terms of this situation your objection is valid. I don't see how you can ask Mr. Crane about those documents.

MR. YAVNER: Dr. Fowler testified yesterday in response to Mr. Powers' questions that he did not know the answers and that only the architect could testify to this.

MR. POWERS: But the information was put in in the first place through Dr. Fowler and you are good enough a lawyer, Mr. Yavner, how you can put things in evidence. You are trying to do indirectly now and get a second bit of the apple from Mr. Crane.

MR. YAVNER: My recollection of the history of this document in this case is that I have never asked a question about it. That you were the first one to ask it when you were questioning him about the answers to the interrogatories.

THE COURT: Go ahead, ask him the questions.

Let's go on, please, gentlemen.

Q What was substituted for the wood bridge?

A A culvert.

Q What was the effect of that substitution on the cost to Fabrizio?

A It reduced it.

MR. POWERS: May I have the item number, please?

THE WITNESS: 3.

Q What records show the amount of punch list or corrective work required by Mars in connection with Fabrizio's work?

MR. POWERS: Objection, your Honor, he is leading the witness.

THE COURT: Objection sustained.

Q Did Mars do punch list or corrective work in connection with the Fabrizio work?

A Yes, he did.

Q What was that work?

A It was the correcting of omissions or poor workmanship or defects of whatever nature in the work performed by Fabrizio & Martin with their own forces.

Q Did the bid forms, the bidding documents, for the completion contract provide for an allowance for corrective

1 Qg 7 Crane-redirect
2 work?

3 A Yes, it did. We made a punch list of these items
4 of work. We first assigned a value of \$10,000 to that in
5 the form of an allowance.

6 During the bidding that allowance was increased
7 by addendum to \$15,000.

8 As Mars-Normel-- what was the question again? May-
9 be I am going too far, but that was the matter insofar as
10 the bid documents was concerned.

11 Q Item 10 on the Exhibit you have before you, what
12 is the number of that exhibit, Mr. Crane?

13 A 122.

14 Q Item 10 of that exhibit refers to sound gaskets on
15 doors.

16 Was that an item in the Fabrizio contract?

17 A Yes, it was.

18 Q The next item, item 11, is vibro-mat.

19 Do you know what vibro-mat is?

20 A On the second floor of the Central Building was an
21 auditorium. There were classrooms directly under it. There
22 was a wood floor in that room. The vibro-mat was a trade
23 name for a sound-isolating or sound-reduction mat which was
24 installed on top of the concrete floor and under the wood
25 floor to reduce sound transmissions when they were having

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Crane-redirect

a band concert or something lese under the rooms below.

Q Was that in the Fabrizio contract?

A Yes, it was.

Q I refer you to item 18 which refers to structural framing and folding partitions.

Was that in the Fabrizio contract?

A Yes, it was.

1 jge 1

2 Q Did that have anything to do with a subcontract of
3 County Iron Works with Fabrizio and Martin?

4 A No, not really with County Iron Works. The story
5 was that Fabrizio bought subcontracted for furnishing and in-
6 stallation of a certain make of folding partition for the
7 gymnasium. This make of folding partition for the gymnasium.
8 This make of partition which he bought was different in detail
9 from the one which we used when we prepared the original draw-
10 ings for the job.

11 It required a different type of provision for support
12 of the track for this folding door. Since this substitution was
13 being initiated and made by Fabrizio and Martin, he therefore
14 assumed responsibility for making an operable installation in
15 accordance with the intent of the bid documents. This addi-
16 tional framing then was part of his obligation.

17 Whether he would require this of the door subcon-
18 tractor or whether he would buy it separately we have no way
19 of knowing.

20 Nevertheless, it was his obligation to install the
21 door and make it work.

22 Q I refer you to item 19 about installing louvres and
23 miscellaneous items.

24 Was that in the Fabrizio contract?

25 A Yes, it was.

1 jge 2
2 Q And the next item of reinforcing steel, item 20,
3 was that in the Fabrizio contract?

4 A Yes, it was.

5 Q Item 25, gym roof, was that in the Fabrizio contract?

6 A Yes, it was.

7 Q Item 27, the extras to Jobin Associates, punch list
8 items for B and C buildings, was that in the Fabrizio contract?

9 A Yes, it was. The item was one of the punch list items
10 for Fabrizio and Martin. The punch list referred to work for
11 work performed by Fabrizio and Martin. Jobin was a contractor
12 for certain specified caulking but not the caulking on this.
13 There was caulking that Fabrizio was supposed to do outside of
14 his contract with Jobin.

15 Therefore, it was part of Fabrizio's obligation.

16 Q Item 29, fire, extinguisher cabinet, was that part
17 of the Fabrizio contract?

18 A Yes.

19 Q Item 30, structural steel balance, was that part of
20 the Fabrizio contract?

21 A The erection of the balance of the structural steel
22 was part of Fabrizio's contract. I want to call attention to
23 the fact that there is an offsetting credit to the steel sub-
24 contractor for a larger amount. What happened was there was
25 a little bit of steel, two or three beams--

Q The credit appears as a deduction in that same schedule?

A Yes, there is an add and a deduction. The deduction happens to be greater than the add so there was a saving in the cost to complete. It was a result of the fact that one or two beams had never been erected by the structural steel subcontractor and rather than have them send men all the way up from New Jersey to put up these beams it was deemed less expensive, and it turned out to be that way, to take the credit from the subcontractor and have Normel do their work with their own men.

Q Item 32, relocation and sort mill work, what does that mean?

A Mill work had been delivered to the job in accordance with a schedule set up by Fabrizio and Martin.

However, the building where the work was to be installed was not ready when the mill work arrived. It had to be stored temporarily in some other location or on the site. One of the other buildings more nearly completed at that point in order to complete the mill work, that is.

In the Mars, Normel contract that was based on the assumption that mill work could be brought to the location where it was going to be installed and the interpretation was that we would have to pay an extra for them to move the material

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2 from one building where it had been stored or to the building
3 where it was going to be used.

4 MR. TRAGER: I would like to object to this while
5 line of testimony. It is my understanding that Mr. Yavner
6 brought Mr. Crane back in in order to get into evidence those
7 records to which we objected by reason of an improper founda-
8 tion being laid.

9 He is now proceeding to go down the line on Dr. Fow-
10 ler's cross to rehabilitate that witness which therein gives
11 him a double opportunity to try his case on an entirely dif-
12 ferent theory or to plug the loopholes he had when he originally
13 had a shot at this witness. On that grounds, I am going to
14 renew that objection and object to this whole line of testimony
15 and move that it be stricken.

16 MR. POWERS: I concur on the motion, your Honor.

17 MR. YAVNER: The records that we have put in show every-
18 one of these expenditures and shows them as an expense that
19 should be attributed to Fabrizio. We have had an attempt yes-
20 terday, through the testimony I am going through right now,
21 to put questions to Dr. Fowler and ask him about these things
22 and those questions did succeed in getting answers from Dr.
23 Fowler that he didn't know what was in--

24 THE COURT: As I understand, the item which is
25 exhibit 122 or some other exhibit that was bought into evidence,

1 jge 5
2 that was not introduced by the defendant in the case, it was
3 introduced by Mr. Powers in his cross examination of Dr. Fowler.

4 MR. POWERS: To the contrary, your HONOR, Mr. Yavner
5 has this same document or a copy of this same document annexed
6 to his supplemental answers to interrogatories and Dr. Fowler
7 sat up on the stand with the supplemental answers to interroga-
8 tories and just went through that supplemental answer item by
9 item and put it in in a lump sum.

10 I cross examined him based on many, Mr. Yavner, putting
11 it in evidence. I didn't put it in. That was the basis of his
12 damages and it was put in through him.

13 THE COURT: Then I concur, I think that the object
14 is well taken.

15 If you put the document in I would be misunderstanding.
16 If you put the document in through Mr. Fowler then it seems to
17 me that Mr. Trager and Mr. Powers are making a very valid
18 objection because what you are doing--and it is obvious what
19 you are doing apparently with the transcript.

20 You are taking Mr. Powers' examination which you
21 heard and you are going down line by line with this witness
22 when you introduced a document through someone which you knew
23 apparently that if they were questioned about it they would not
24 be able to answer the questions.

25 I don't think that is appropriate to conduct this

case.

MR. YAVNER: That is not what happened according to my recollection. What happened was that I gave copies or I served my amended and supplemental answers to interrogatories, gave these gentlemen copies of it. I did not put it in when Fowler was on the stand. I did not give him a copy of it. My recollection is that early in Mr. Power's cross examination of Mr. Fowler he showed it to Mr. Fowler and used it as the basis for questions.

But all that I did with the document was serve it to my adversaries and give a copy to the Court. That is my recollection of it.

MR. POWERS: Your Honor, Mr. Yavner has a short memory. In the supplemental answers to interrogatories, the original of which I assume the Court has, on the second page, the third item--I am sorry, this refers to the payments to Mars, Normel which is next to the last item on the first page, payments to Mars, Normel on the Fabrizio and Martin contract, \$428,164. Backing up this supplemental answers to interrogatories are the contract with Mars, Normel for \$403,000 plus this change order that Mr. Yavner is referring to to come up with the difference in dollars to arrive at the \$428,000 and for him to stand there and say that he didn't introduce this in evidence is a discredit to the Court.

1 jge 7
2 MR. YAVNER: My recollection is as I stated it, that
3 I gave it to them and that Mr. Fowler did not use it until
4 Mr. Powers handed it to him to check on various of the figures
5 in there.

6 The record will establish which of us has a better
7 recollection.

8 MR. POWERS: Dr. Fowler had the copy of the supple-
9 mental answers to interrogatories from which he was testifying
10 and he had my copy.

11 THE COURT: I can't resolve the problem. I will
12 have to read the transcript to find out which of you is cor-
13 rect.

Q Please refer to item 34 in reference to Chalk Board.
Was that part--

MR. TOPLITZ: I object to that. He is telling him
the answer, your Honor.

MR. YAVNER: I will withdraw the question.

THE COURT: Mr. Toplitz, if you are going to participate
in this case, I think you are going to be subject to the same
rules as all the other lawyers.

If you are going to be here, don't come in and out
of my court at will, you come here on time as all the lawyers
do.

MR. TOPLITZ: I am sorry, your Honor.

Q Mr. Crane, what was the basis for including item 34 as
an extra?

A There was a subcontract of Fabrizio and Martin for
furnishing and installing chalk boards.

THE COURT: I am giving you one more time. If there
is one more objection and I hear that you are leading the
witness, any further witness, I am going to suspend the examina-
tion.

You have told that time and time again and I am weary
of it.

MR. YAVNER: I am sorry, your Honor.

THE COURT: You know how to handle a trial.

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2 A There was a subcontractor of Fabrizio and Martin for
3 furnishing and installing chalk boards. That subcontractor
4 declined to go along with the proposal by the Board that it
5 sign an agreement with the Board which would then be picked up
6 by the new contractor for general construction, therefore,
7 Mars, Normel did the work with their own people.

8 The amount of the subcontract was \$660. That shows
9 in item 35 as a deduct from the cost. It cost Mars, Normel
10 more than the subcontractor amount, therefore, it was an add
11 of \$996.42 with a net change of \$336.42.

12 Q I refer you to item 34. What is the inscription on
13 that item.

14 A Complete installation of chalk board.

15 Q I refer you to item 36, miscellaneous brick paving,
16 is that right?

17 A That's correct.

18 Q What is the basis for including that as an extra?

19 A The brick paving was interior paving in the lobbies
20 of the buildings. It was part of Fabrizio and Martin's
21 obligation. Apparently it had been omitted from the Mars
22 Normel--from the bid documents and, therefore, from the Mars
23 Normel contract. The work had to be done, but it was obviously
24 an increase to Mars, Normel's contract.

25 MR. YAVNER: I shall ask no further questions of this

1 qte 3

2 witness, your Honor.

3 THE COURT: All right, Mr. Powers.

4 MR. POWERS: Actually, before cross, your Honor, I
5 would like to renew my motion to strike all evidence that Mr.
6 Yavner adduced from this witness in connection with this item.

7 Starting on page 135, which I don't have the earlier
8 portion of the transcript, but on page 135 Mr. Yavner refers
9 to the amended answers to interrogatories and the various sche-
10 dules annexed thereto, and all of this testimony that he just
11 introduced through Mr. Crane had been previously covered by
12 Dr. Fowler.

13 THE COURT: I indicated to you what I was going to
14 do with that, Mr. Powers. If you are correct, this is not
15 going to be considered.

16 RECROSS EXAMINATION

17 BY MR. POWERS:

18 Q Mr. Crane, you had a time and material contract with
19 Mars, Normel, correct?

20 A Yes.

21 Q As far as payments were concerned, you set up proce-
22 dures for methods of paying Mars, Normel, correct?

23 A Yes, yes.

24 Q Wasn't it a fact that Mars Normel was required to keep
25 accurate time records concerning the personnel that it employed

1 gte 4
2 indicating the date on which the men work, the number of hours
3 they worked each day?

4 A Yes.

5 Q And the type of work they were performing?

6 A Yes.

7 Q I show you Defendants' Exhibit 100, and please tell
8 me where that information is contained in that exhibit?

9 A There seems to be no daily slips for labor attached
10 to this particular copy of this particular requisition.

11 Q Isn't the same true with respect to a majority of
12 these exhibits that you have introduced in connection with Mars
13 Normel and Bradhurst and MacNamee?

14 A No, it is not.

15 Q I refer you to them and you tell me which ones do
16 not have the exhibits that exhibit 100 does not have?

17 A Number 101.

18 Q Does not have it?

19 A Does not have it.

20 Q The same as 100.

21 A Right.

22 Number 102 does not.

23 103 does not.

24 I should point out, however, that Mars, Normel--

25 Q No, if you please.

2 A -- was working.

3 Q Just answer the question, please, Mr. Crane.
4 Your attorney can ask you anything he would like.

5 A What is your question again, then?

6 Q Indicate all those exhibits that you have in
7 front of you which do not have detailed information as
8 Exhibit 100, as you have been doing so far.

9 A I will re-track these, then. They do contain
10 detailed evidence.

11 Q Show me the detailed evidence, as you testified,
12 that he was required to show the number of men, the hours
13 they worked and the work that they were performing.

14 A Mars-Normel requisition No. 1, May 1, 1966, there
15 is attached--

16 THE COURT: The better way is to give us the ex-
17 hibit number so we can get it on the record.

18 THE WITNESS: Excuse me, your Honor.

19 Exhibit No. 100.

20 A As back-up to Exhibit No. 100 there are detailed
21 statements from Mars-Normel for the costs that went into
22 the making up of that exhibit.

23 Q Tell us what those detailed costs are as con-
24 tained in the exhibit.

25 A There is a summary on the front which has --

Q A summary? I want details, no summaries, please,
Mr. Crane.

A The first item of back-up is headed Extra Work.
It lists superintendent, three weeks at \$250 --

Q What days?

A Three weeks, every day.

Q What three weeks?

A He was a weekly employee.

Q What weeks?

A This contract-- this invoice, rather, is dated
May 1 for work done during April. The three weeks would
be the three weeks starting when Mars-Normal came on site.

Q When did Mars-Normal start on the site?

A I don't recall exactly, but it was in April.

Q Then you don't know the validity of this statement
here as to whether the superintendent was on three weeks
or he was not on three weeks, isn't that so?

MR. YAVNER: Your Honor, I don't think--

THE COURT: What is your objection?

Don't testify, tell me what the objection is.

MR. YAVNER: I withdraw my objection.

A The requisition, in general, bears my initials--

Q No, details, Mr. Crane; not generalities; de-
tails.

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A You asked me how did I know the man was on the job for three weeks?

Q Yes.

THE COURT: Answer the question, Mr. Crane.

A I initialled the requisition, as did Mr. Beardsley.

In 1966 I would know that he had been on the job for three weeks. Now I can't recall--

Q I want to know today.

A I cannot recall today what date Mrs. Normel started work, no. But in May 1966 I knew.

Q Isn't it a fact that they didn't sign their contract until April 12?

A The signing of the contract may not have been tied directly to the date that they started work.

Q Are you saying they may have started work before they signed the contract?

A They may have. They may have had a man on site getting familiar with the work.

April 12 is how many days until the end of April? That is 14 days. That is two weeks.

Q So you are charging Fabrizio & Martin for a superintendent that might have been on the job before the contract was even signed?

A Yes.

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Q All right.

A I am not saying he didn't work, but he may have been working before the contract was signed.

Q What is the next item after the superintendent?

A Carpenter foreman.

Q What was the carpenter foreman doing?

A He was there 62 hours. That is only, roughly, a week and a half.

Q What did he do during that week and a half, Mr. Crane?

A I can't tell from this.

Q Where is the summary or, I mean, the details?

Isn't it a fact that that is a summary of someother details that you had to look at and did look at?

A Yes. The other details are not attached to this copy of the requisition.

Q Exactly. Isn't it true that the details are not annexed to the other exhibits just as well?

A I had not gone through all of them. I don't know.

Q Of those that you --

A The ones that I listed did not have daily slips attached to them, no.

Q And you had to check the daily slips to know

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2 what men were working and where they were working and
3 what they were being charged against, correct?

4 A Yes.

5 Q As you already testified?

6 A Yes.

7 Q And you don't have that information in these ex-
8 hibits, do you?

9 A No.

10 THE COURT: Are you saying that is true through
11 Exhibit 121? Those are all the exhibits.

12 MR. POWERS: There are some gaps in there, I
13 think, your Honor.

14 THE COURT: Yes, I know. There are two gaps.
15 One is from 101 to 107. I don't know what happened to
16 108.

17 MR. POWERS: I have 108, your Honor.

18 THE COURT: There was no reference made to 108.
19 I don't know what happened to it.

20 MR. POWERS: That is a claim form of MacNamee,
21 dated May 30, 1966.

22 THE COURT: All right. So that that is true of all
23 those exhibits that -- through 121?

24 THE WITNESS: I think that is safe to say, your
25 Honor, because the daily slips for a month of work would

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790a
Crane - redirect

597

3 have to be a sizeable bundle. That is probably the prac-
4 tical reason why they are not attached to these individ-
5 ual requisitions.

6 Q But they were kept, were they not?

7 A Presumably. They would be the Board's property.

8 Q And they were examined, were they not?

9 A Yes.

10 Q In addition, again referring to Exhibit 100, you
11 have extra work and, again, this is a summary of extra
12 work, the first item being carpenter foreman, eight hours,
13 at \$6.40 an hour.

14 What work was the carpenter doing as represented
15 by that item?

16 A I can't tell.

17 Q And this is what you are charging Fabrizio &
18 Martin for as an extra, correct?

19 A I don't know. I would have to know what the item
20 of work was, because some of the items on the Mars-Normal
21 change order were not allocated to Fabrizio. We have
22 already said that.

23 Q Well, then, how do you know what items are al-
24 located to Fabrizio & Martin and what items are not al-
25 located to Fabrizio & Martin if you can't tell from these
sheets?

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791a
Crane-redirect

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2 A I would have to have looked at these daily sheets
3 that we have just been talking about, of which there would
4 be a sizeable bundle each month.

5 Q So it was only from reviewing these daily sheets
6 that you could tell what work was extra work and what work
7 was not extra work?

8 A These daily sheets?

9 Q Yes.

10 A Yes.

11 Q But you don't have those sheets here today?

12 A No, I don't.

13 Q So then I can't tell what you are allocating as
14 extra work and what you are allocating as non-extra work,
15 can I, from reviewing these documents?

16 A I think it is reasonable to assume that--

17 Q No, no.

18 A -- we reviewed these bundles of daily sheets
19 to verify the fact that this carpenter foreman, eight hours,
20 was for extra work.

21 Q You may have verified it and you may have deter-
22 mined it as extra work, but how do I verify it and how do
23 I determine whether it was extra work based on the docu-
24 ments you have produced today?

25 A Since it was my obligation to verify it and I have

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initialled these things, the owner's on-site full time representative had also initialled these things; that, to me, indicates that they were verified and, therefore, they are proper.

Q Isn't it a fact that I or someone else could interpret the contract documents differently than you?

Isn't that a possibility?

A That is a possibility, but I was the one charged with doing it.

Q And isn't it a fact that you could be wrong on occasion in determining whether something is extra work or non-extra work?

A Yes.

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793a
Crane- recross

600

Q It is a possibility.

And isn't it a fact that you don't have any back-up material for any of these items of extra wlrk, not only for Mars-Normel, but also for Bradhurst and MacNamee?

A I seem to recall in the Bradhurst and MacNamee requisitions there were daily sheets for labor and equipment rental and such items.

Q Would you find them, please, and refer to them, Mr. Crane?

A This is not the group I am thinking of. There were some requisitions which had a thick bundle of small yellow sheets attached to the back of them. They were either MacNamee or Bradhurst or both.

Q These are all of the exhibits that have been introduced and I think they deal with MacNamee.

Here is MacNamee's and I believe they also cover Bradhurst.

A I still say that this morning I saw requisitions and I clearly recall thick bundles of daily sheets signed by John Beardsley.

Q Possibly you or your counsel can find them then. They apparently are not in evidence.

A Well, here is the MacNamee No. 108, which we were talking about a moment ago. And attached to the back of it

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794a
Crane-recross

3 is a sheet which lists names, trade, hours worked, work as
4 authorized by Bedford Middle School, time and material plus
5 10 per cent plus 10 per cent signed by John Beardsley, who
6 was the owner on site representative.

7 Q Does it indicate the work that was being performed
8 by all of those men?

9 A It does down here at the bottom, but since this
10 is a Xerox and maybe a Xerox of a Xerox, it is very dif-
11 ficult to read it. I can't read it.

12 Q I can't either.

13 You can't tell what work they might have been doing?

14 A No.

15 Q Do you know whether that was extra work or contract
16 work?

17 A I would have to judge that it must have been--

18 Q Don't judge now. I want to know whether you can
19 tell me factually, no ifs, ands or buts.

20 A This was part of MacNamee's cost plus contract.

21 Q How can you tell that?

22 A Because he is billing for men and equipment and
23 such items in detail. His lump sum contract was for
24 furnishing and installing certain roads and curbing and so
25 on under a lump sum contract and there would be no reason
for him to submit all of this detail on his lump sum

requisition.

Q So this is one his time and material?

A This is on the cost plus contract.

Q But is it extra work or time work on his contract?

A From this purely photostated copy it is difficult to tell.

It is cost plus work, Bedford Middle School, not an extra presumably.

Q He does not say it is is an extra and he does not say it is not an extra?

A Since he does not say it is an extra, it is reasonable to assume it was part of his base cost plus contract.

Q Again referring to Exhibit 108, Mr. Crane, which contract was this work performed pursuant to?

A This is MacNamee's contract fo miscellaneous site work in the amount of-- in a cost plus guaranteed maximum contract with a guaranteed maximum of I think it was \$25,500.

Q Miscellaneous site work?

A I don't remember the wording of it.

Q Is that what you said? He didn't have a contract for miscellaneous site work, Mr. Crane?

A Yes, he did.

Q Let us go back to the contract.

796a

Qg 4

Crane-recross

A Maybe it was other site work. I don't remember the exact words that described it in English but there was a contract with MacNamee to provide miscellaneous site work or whatever term was used in the actual document. But that was the purpose of it.

Q I show you the two MacNamee contracts (handing).

A The one which happens to be on top is the cost plus contract for miscellaneous site work. He is referred to in this contract as the grading contractor.

Q Was it general site development or miscellaneous site work?

A What is the question?

Q Is it general site development or miscellaneous site work?

A Yes.

Q Yes, which?

A Yes, it is for miscellaneous site work.

There is Article 2 or Paragraph 2, obligations of the grading contractor. The grading contractor shall perform all of the work and furnish all of the labor, materials, tools, machinery, equipment, facilities, supplies and services and do all things necessary for the proper completion of the grading, site development and

797a

@g 5

Crane-recross

related work as provided in the contract documents, except as limited herein.

The grading contractor agrees to be responsible for and will superintend the execution of all the works covered by this agreement.

The grading contractor agrees to consult and cooperate with the architect, give advice, make suggestions and wherever possible--

Q All right, I don't think we need any more of this.

A As we go on through that it spells out certain work which is miscellaneous site work.

Q Isn't it a fact that MacNamee had two contracts with the School Board?

A That is correct.

Q Now I refer you to Schedule 1, page 2, to the supplemental answers to interrogatories, and it has Daniel MacNamee and three separate contracts listed; general site development for \$19,000 -- that is the claim being made against Fabrizio & Martin -- miscellaneous site work for \$20,000--

MR. YAVNER: Your Honor, we have the same problem as yesterday when Mr. Fowler was testifying on this. There are not three contracts listed, there are three items

798a

Qg 6

Crane-recross

1 listed, and I think it is a misdescription.

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3 MR. POWERS: They were listed by the plaintiff,
4 your Honor.

5 MR. YAVNER: They are not listed as contracts,
6 they are items of amounts.

7 MR. POWERS: All right. I will rephrase it.

8 Q Mr. Crane, is the general site development work
9 covered in one of the contracts with the School Board and
10 MacNamee?

11 A Yes. That is what I have been referring to as the
12 cost plus contract.

13 Q Is there a contract with MacNamee for miscel-
14 laneous site work?

15 A The miscellaneous site work is an addendum or
16 a change to the cost plus contract to cover work not
17 included in the cost plus contract.

18 Q Where is that change, Mr. Crane, indicating that
19 there is an amendment to this contract or change to this
20 contract to include this type of work?

21 A Well, I don't have it in front of me, but there
22 had to be a change order to MacNamee cost plus contract to
23 amend his cost plus contract to reflect extra work which he
24 was required to do.

25 Q Would you find that, please?

1 A The cost plus contract is spelled out in as good
2 detail as he could what he is going to do for the
3 \$25,500 guaranteed maximum contract.
4

5 Anything beyond that on a cost plus basis would
6 have to be amended to his guaranteed maximum and he is
7 billing for work as it occurred in this \$20,000 item.

8 Q Could you look through your records and find
9 that change order by which this work was included within
10 the time and material general site development contract?

11 THE WITNESS: Do you know if we have change
12 orders?

13 MR. YAVNER: They may be in one of these boxes.

14 Q They are, again, annexed to the supplemental answers
15 to interrogatories which were introduced through
16 Dr. Fowler.

17 I assume they are all the change orders that
18 there were.

19 A I don't find a copy of such a change order among
20 the documents I have here.

21 Q Well, you have all of your documents here, Mr.
22 Crane. You can look through anything you would like.

23 A Well, there are a lot of papers here.

24 Q I assume your counsel prepared these and knows
25 where these documents are.

Qg 8

Crane-recross

THE WITNESS: Shall I start searching for the documents, your Honor?

MR. YAVNER: Mr. Crane, which is your carton? There is a carton with your material here.

THE WITNESS: I don't know, but I did not bring all of the documents we had on this job.

MR. POWERS: Your Honor, I respectfully submit that it is an act of futility, because all of the change orders to Bradhurst, MacNamee and Mars-Normel were supposedly annexed to answers to interrogatories, and if there is a change order which was not annexed to these answers to interrogatories then I would object to anything being introduced because it was not furnished under pre-trial discovery.

THE COURT: So you have two bites at the apple.

MR. POWERS: I think I might --

THE WITNESS: May I read this contract again for a moment, your Honor?

It may be that a formal change order was not called for under the contract.

That is not correct. Paragraph 4, it says, "Payments to general contractor: (a) The owner shall pay to the grading contractor the cost as defined below of all materials, labor and other expenditures necessary

for the completion of the work, including change orders and authorized overtime work."

Then it goes on. But, I mean, that does seem to say that change orders shall be issued.

Now, I would like to read a little bit more before I end my comments.

It goes on to say: "The guaranteed maximum as increased or decreased or otherwise provided for by change in the work involving extras or credits or by authorized overtime work shall be known as the adjusted guaranteed maximum."

Q Isn't that guaranteed maximum \$25,500?

A The guaranteed maximum subject to amendment by change orders was \$25,500 when it was signed, yes.

Q And then--

A It goes on to say: "Should the cost of the work, plus the fee, exceed the adjusted guaranteed maximum, all such excess costs shall be borne by the grading contractor."

Q Taking these two items, Mr. Crane, the general site development and the miscellaneous site work, we come up with approximately \$40,000.

A Correct.

Q And no change order has been introduced showing that there has been an increase from that \$25,500 to

802a

gtg 10

Crane-recross

\$40,000, so wouldn't you assume that this miscellaneous site work was not included within that general site development time and material contract?

A No, I would not assume that. I would assume it was included, but we just have not the change order here in the courtroom which increases the guaranteed maximum from \$25,500 to \$45,000 or whatever it is.

Q But you have not been able to find such a change order, have you?

A Well, you asked me about five minutes ago. No, I have not.

Q Do you ever recall seeing such a change order?

A I can't recall yes or no. It was seven years ago.

MR. POWERS: Your Honor, I have really nothing else of this witness, other than possibly going through the change orders of the Mars-Normel contract, and I think that was subject to your Honor's ruling as to how this got into evidence in the first place.

I suspect I could be examining Mr. Crane for approximately a half hour or so in connection with these items if I do go into them. I again, renew my objection to the testimony that Mr. Crane had given on this originally through Mr. Yavner a few minutes ago or renew the motion or second the motion of Mr. Trager that any

1 gtg 11

2 Crane-recross

3 testimony that was adduced through Mr. Crane by the ques-
4 tioning a short while ago be stricken from the record
5 concerning this change order.

6 THE COURT: I think I told you my position on it.

7 MR. POWERS: I thought you reserved decision to
8 find out who brought this in.

9 I will go ahead subject to it.

10 THE COURT: That is the only suggestion I can
11 make.

12 MR. POWERS: Possibly if we could have maybe
13 two minutes to check the transcript, would that be of any
14 benefit to the Court?

15 THE COURT: I think what you--

16 MR. POWERS: Or I can go ahead? Whichever your
17 Honor prefers.

18 MR. YAVNER: I have found it.

19 THE COURT: I don't want to go into that. I
20 don't want argument about that. It is either in the
21 record or it is not.

22 It seems to me rather than waste any time on it
23 in regard to you, Mr. Powers, I think out of an abundance
24 of caution, you better make your case the best way you
25 think on the theory that it is not in there.

 MR. POWERS: All right, fine, your Honor.

Q Mr. Crane, I will give you a copy of Exhibit 122, if I may, and we will refer to that exhibit.

I believe the first item that Mr. Yavner referred to in that change order, Exhibit 122, was item 3, eliminating the wood bridge at the Central building.

You said, as I recall, that that bridge was replaced by a culvert and that this resulted in a saving to Fabrizio & Martin.

Could you tell me, please, is that a proper statement that I just made?

A yes.

Q Could you tell me, please, what the cost of the culvert that replaced the bridge was?

A Not offhand, no.

Q You don't know.

Let me go to item No. 5. I am not sure whether that was covered or not. That is, to purchase and install toilet room accessories.

What accessories were not furnished by Fabrizio & Martin?

A That would be soap dispensers and toilet paper dispenser and probably in the case of girls' toilets, napkin dispensers.

Q And in what locations did he not furnish them?

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gtg 13

Crane-recross

A He had not put them in any of the toilets.

Q Are you saying that you purchased and installed
toilet room accessories for the entire project?

A Yes, sir.

Q And you purchased and installed all of the
toilet room accessories for \$1400 plus?

A Yes, sir.

Qg 1

Crane-recross

Q Now, I refer you to item 8, overrun on punch list, \$14,000 plus.

I believe you testified that there was an original allowance of \$15,000 for punch list items, correct?

A That is right.

Q Isn't it a fact that the original contract documents that were let out to all of the bidders provided for an allowance of \$10,000 for punch lists?

A My recollection is that the \$10,000 was discussed in the pre-bid conference but an addendum was issued increasing the allowance to \$15,000.

Q Could you produce a copy of that addendum, please?

A It is a little bundle of addenda to the specifications which was included.

MR. YAVNER: May Mr. Crane come down to find it? I don't know where these records are now. Mr. Fowler had been handling them.

THE COURT: All right.

I really do not understand how you come into court without knowing where the records are that are necessary for your case.

MR. YAVNER: I apologize, your Honor.

THE COURT: I am going to give you a few more minutes to find that. Otherwise we are going to proceed

807a
Crane-recross

Qg 2

without it.

MR. POWERS: If I had a copy I would gladly produce it. None was produced prior to this.

THE COURT: It is not your responsibility, Mr. Powers.

MR. YAVNER: I do not see it, your Honor. We had a file of all the bid documents on the re-letting and it has been taken apart and I don't see that document.

THE COURT: All right.

Q Let me try it another way then, Mr. Crane.

The Mars-Normal contract as originally prepared provides for an allowance of \$10,000, correct?

A The document which you have handed me has affixed at that point in the detail of the agreement a piece of paper on which item or paragraph 6, allowance for corrective work, that has been restated as a different sum. The printed form says as set forth in the supplementary instructions to bidders, guaranteed maximum deemed to include an allowance of \$10,000 for correction of any defects discovered in the work of the former contractor and so forth.

That has been replaced with another piece of paper which says a guaranteed maximum is deemed to include an allowance of \$15,000 for correction of punch list items

Qg 3

Crane-recross

described in addendum No. 7 and of any other defects discovered in the work of the former contractor.

This piece of paper is initialled by two parties.

Q Would it be fair to assume, Mr. Crane, that the original contract with Mars-Normel which provided for the \$10,000 contingency or allowance was prepared after bids were accepted?

A State that again, please.

Q Would it be fair to assume that this contract document, namely, the contract between Mars-Normel and the School Board, was prepared subsequent to the acceptance of bids by the School Board?

A I would like to ask what you mean by prepared.

Q Typed up in the form that it exists except for the name of Mars-Normel and of course the signature.

A If I understnad your question correctly I would say no, that is not a necessary assumption because the bod document in its body is in black print. It seems to be a reproduction of some sort and typed in in different type and in different color ink is the specific information as to the date of the agreement and the successful bidder.

It looks as though this document was prepared some time during the bidding in anticipation of letting a contract and it may have been typed before the addendum

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was issued changing the amount of the allowance from \$10,000 to \$15,000.

Q But we don't know when it was prepared?

A No.

Q With respect to the overrun on the punch list, do you have any documentation to substantiate the claim that there was an overrun of \$14,000 plus, over and above the \$15,000 provided for in the Mars-Normel contract?

A The Mars-Normel requisitions showed an item each time of charges against the punch list work and this was included with each requisition if they had done work on the punch list which they did normally.

The total of these charges exceeded the \$15,000 allowance in their contract.

Q By \$14,000?

A Yes.

Q Assuming that to be the fact, which I haven't checked, but assuming that there is an excess and that their overrun ran to approximately \$29,000 plus, still the information that you have furnished in support of the requisitions of Mars-Normel do not have back-up material to indicate exactly what these punch list items are, is that correct?

A The back-ups attached to the requisitions does not

Qg 5

Crane-recross

say what the man is working on, is that what you mean?

Q Correct.

A Right.

Q We don't know what the punch list item is then?

A Not from the limited amount of back-up included with the requisition.

Q To try and save time I will just hit the major items in this change order and ignore the smaller ones.

Item 11 is furnish and install vibra-mat, and you testified earlier that this was part of the Fabrizio & Martin contract?

A Yes.

Q I ask you if you would show me where there is provision for Fabrizio & Martin furnishing a vibra-mat in the specifications.

A I don't recall offhand whether it was in the specifications or in the drawings. I can take a look in some of the more likely spots in the specifications but it may have been in the drawings.

Q Do you have the drawings with you?

MR. YAVNER: If your Honor please, while the witness is looking for that, I have not found a document saying that this changes to the \$15,000 allowance but I have found a bid document which refers to it.

